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No. _____

SUPREME COURT, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

GARY D. MAYNARD and the
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA,

Petitioners,

vs.

WILLIAM THOMAS CARTWRIGHT,

Respondent.

APPENDICES TO THE PETITIONERS' PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

WILLIAM THOMAS CARTWRIGHT,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	No. 86-1231
	)	
GARY D. MAYNARD, Warden, Oklahoma State Penitentiary at McAlester, Oklahoma,	)	
	)	
and	)	
	)	
ROBERT H. HENRY, successor to MICHAEL J. TURPEN, Attorney General of Oklahoma,	)	
	)	
Respondents-Appellees.	)	

Appeal from the United States District Court for the Eastern District of Oklahoma, D.C. No. 86-54-CIV

Mandy Welch, of Payne and Welch, Hugo, Oklahoma, for the Petitioner-Appellant.

David W. Lee (Robert H. Henry, Attorney General, with him on the briefs), Assistant Attorney General, Oklahoma City, Oklahoma, for the Respondents-Appellees.

ON REHEARING EN BANC

Before **HOLLOWAY**, Chief Judge, **BARRETT, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA and BALDOCK**, Circuit Judges.

TACHA, Circuit Judge.

Petitioner William Thomas Cartwright appeals from the denial of habeas corpus relief by the United States District Court for the Eastern District of Oklahoma. Cartwright was convicted of the murder of Hugh Riddle and sentenced to death following a determination that the murder satisfied two statutory aggravating circumstances and that these aggravating circumstances outweighed the mitigating evidence. Cartwright alleges that the state of Oklahoma applied the

"especially heinous, atrocious, or cruel" aggravating circumstance in a unconstitutionally vague and overbroad manner in this case. We agree.

Cartwright was tried and convicted of first degree murder for the shooting of Hugh Riddle.[1] The state argued that three of the aggravating circumstances enumerated under Oklahoma law justified the imposition of the death penalty: first, the defendant knowingly created a great risk of death to more than one person; second, the murder was "especially heinous, atrocious, or cruel;" and third, the existence of a probability that the defendant would commit criminal acts of violence that

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[1] Cartwright was also convicted of shooting Charma Riddle with intent to kill. He was sentenced to seventy-five years imprisonment for that crime.

would constitute a continuing threat to society. See Okla. Stat. Ann. tit. 21, §§ 701.12(2), (4), (7) (West 1983). The jury concluded that the first two aggravating circumstances were established, but that the evidence did not support the third aggravating circumstance. The jury then weighed the aggravating circumstances and the mitigating circumstances and sentenced Cartwright to death for the murder of Hugh Riddle.

The Oklahoma Court of Criminal Appeals affirmed the convictions and sentences on appeal. Cartwright v. State, 695 P.2d 548 (Okla.Crim.App.), cert. denied, 105 S.Ct. 3538 (1985). The state courts then denied Cartwright's petition for a writ of habeas corpus. A panel of this court affirmed the denial

of the petition. Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986). We granted rehearing en banc on the question of the application of the "especially heinous, atrocious, or cruel" aggravating circumstance.[2]

There are three questions presented in this appeal. First, we must decide whether reliance upon an unconstitutionally vague or overbroad statutory aggravating circumstance requires the reversal of a death sentence

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[2] The previous panel decision disposed of all six of Cartwright's suggested grounds for habeas relief. See Cartwright v. Maynard, 802 F.2d at 1209-22. We do not disturb the decision of the panel regarding five of those issues. We only consider Cartwright's allegation that Oklahoma's application of the "especially heinous, atrocious, or cruel" aggravating circumstance in this case was vague and overbroad in violation of the Eighth and Fourteen Amendments to the Constitution of the United States.

where the sentencer was required to balance the aggravating circumstances with the mitigating circumstances. Second, if such reliance requires that the death sentence be vacated, we must then decide whether the Oklahoma courts in this case applied a constitutionally adequate narrowing construction of "especially heinous, atrocious, or cruel" to the facts of this case. Finally, if the state courts failed to apply a proper narrowing construction, we must decide whether this court can apply a narrowing construction of "especially heinous, atrocious, or cruel" to the facts of this case.

For the reasons stated in this opinion, we conclude that: (1) reliance upon a constitutionally invalid aggravating circumstance requires that

the death sentence be vacated; (2) the Oklahoma courts failed to apply a constitutionally adequate narrowing construction in this case; and (3) this court cannot decide what narrowing construction is to be applied by the state of Oklahoma. We therefore remand to the district court with directions to enter judgment in accord with this opinion.

I.

Cartwright was sentenced to death after two statutory aggravating circumstances were established. If Cartwright's death sentence can rest on the unchallenged aggravating circumstance of creating a great risk of death to more than one person, we need not reach the constitutional challenge to the "especially heinous, atrocious, or cruel"

aggravating circumstance. See, e.g., Superintendent, Massachusetts Correctional Inst. v. Hill, 472 U.S. 445, 450 (1985) (a federal court will address a constitutional question only when it is necessary to the resolution of the case before the court). Thus, we must first decide whether the unchallenged aggravating circumstance supports the death sentence even if the challenged aggravating circumstance were found to be invalid.

The validity of a death sentence based in part on consideration of an invalid aggravating circumstance "depends on the function of the jury's finding of an aggravating circumstance under [a state's] capital sentencing statute, and on the reasons that the aggravating circumstance at issue . . . was found to

be invalid." Zant v. Stephens, 462 U.S. 862, 864 (1983); see also Barclay v. Florida, 463 U.S. 939, 951 (1983); accord Andrews v. Shulsen. 802 F.2d 1256, 1263 (10th Cir. 1986). The Supreme Court has addressed this question under Georgia law in Zant and under Florida law in Barclay and Wainwright v. Goode, 464 U.S. 78 (1984). We are presented with the same question under the law of Oklahoma.

Under the Georgia statute reviewed in Zant, first degree murder is not necessarily a capital offense. The death penalty can be imposed for first degree murder only if at least one statutory aggravating circumstance is established. A statutory aggravating circumstance is used simply to cross the threshold dividing first degree murders that are not eligible for the death penalty and

first degree murders that are eligible for the death penalty. It does not matter how many statutory aggravating circumstances are present -- only one is needed to cross the threshold. Therefore, as long as one valid aggravating circumstance remains, the murder is a capital offense even if other aggravating circumstances are subsequently found invalid.

Moreover, an aggravating circumstance under the Georgia statute is used only to determine which first degree murders are capital offenses. An aggravating circumstance does not play the additional role of guiding the sentencer in the exercise of its statutory discretion in deciding whether to sentence a particular murderer to life imprisonment or to death. No particular aggravating

circumstance is afforded special weight. There is no requirement that aggravating circumstances be balanced against mitigating circumstances. See Zant, 462 U.S. at 873-74.

The Zant Court held that two valid aggravating circumstances served the constitutionally required function of narrowing the class of persons eligible for the death penalty even though a third aggravating circumstance -- that the defendant had "a substantial history of serious assaultive criminal convictions" -- had been held unconstitutionally vague. Id. at 878-79. Once the class of persons eligible for the death penalty has been determined, "the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that

class, those defendants who will actually be sentenced to death." Id. at 878 (footnote omitted). The Court then held that the evidence of the defendant's prior criminal record, while not a valid statutory aggravating circumstance, could be considered by the sentencer in selecting the proper punishment. Thus, although the defendant's prior criminal record was improperly considered as a statutory aggravating circumstance, the Court allowed the jury to consider such evidence in deciding whether to impose the death penalty. Labeling the evidence of a prior criminal record as a statutory aggravating circumstance "arguably might have caused the jury to give somewhat greater weight to respondent's prior criminal record than it otherwise would have given," but that possibility did not

rise to the level of constitutional error. Id. at 888-89.

The purpose of an aggravating circumstance in the Oklahoma statute is decidedly different from the purpose of an aggravating circumstance in the Georgia statute considered in Zant. An aggravating circumstance under the Oklahoma scheme does not establish a threshold that distinguishes capital murders from other first degree murders. In Oklahoma any first degree murder is punishable by life imprisonment or death. Okla. Stat. Ann. tit. 21, § 701.9 (West 1983). Therefore, the Oklahoma statute is unlike the statutes in those states in which aggravating circumstances are employed to narrow the class of first degree murderers that are eligible for the death penalty. See Zant, 462 U.S. at

875 (Georgia); Andrews, 802 F.2d at 1263 (Utah); Welcome v. Blackburn, 793 F.2d 672, 677 (5th Cir. 1986) (Louisiana). Cf. Johnson v. Thigpen, 806 F.2d 1243, 1248 (5th Cir. 1986), cert. denied. 107 S. Ct. 1618 (1987) (Mississippi).

Oklahoma uses an aggravating circumstance to guide the discretion of the sentencer in determining whether the death penalty should be imposed for a particular murder. Okla. Stat. Ann. tit. 21, § 701.10 (West 1983). The sentencer must balance all of the statutory aggravating circumstances with all of the mitigating circumstances. Okla. Stat. Ann. tit. 21, § 701.11 (West 1983). Zant does not determine the effect of consideration of an unconstitutional statutory aggravating circumstance under the Oklahoma statute,

for the Court in Zant carefully observed that it did "not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is "invalid" under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty." 462 U.S. at 890; see also id. at 873-74 n. 12.

Florida, like Oklahoma, uses an aggravating circumstance to guide the discretion of the sentencer rather than to define which first degree murders are capital offenses. In this respect the Oklahoma statute is similar to the Florida statute reviewed by the Supreme Court in Barclay and Goode.

Nevertheless, this case differs from Barclay and Goode in two important respects. First, the Oklahoma courts do not reweigh the aggravating and mitigating circumstances after an aggravating circumstance has been found invalid. Second, this case involves an allegation that an aggravating circumstance is invalid under the federal constitution rather than state law.

In Barclay the trial judge found several aggravating circumstances but no mitigating circumstances and sentenced the defendant to death. The State conceded before the Supreme Court that one of the aggravating circumstances relied upon by the state courts--Barclay's criminal record -- was not a statutory aggravating circumstance under state law. Barclay, 463 U.S. at 946. In

cases where no mitigating circumstances were found, the Florida courts had held that the effect of a sentencer's erroneous consideration of an improper aggravating circumstance would be determined by a harmless error analysis. Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977), cited in Barclay, 463 U.S. at 955, 966 n.12.

The Supreme Court held that this procedure satisfied the constitutional demand of "an individualized determination on the basis of the character of the individual and the circumstances of the crime." Barclay, 463 U.S. at 958 (plurality opinion of Rehnquist, J., with Burger, C.J., & White & O'Connor, JJ.); id. at 967 (Stevens, J., with Powell, J., concurring in the judgment) (quoting Zant, 462 U.S. at 879)

(emphasis original). Justice Rehnquist wrote that because the aggravating circumstance was invalid only under state law,

> [T]his case is distinguishable from Zant v. Stephens . . . where one of the three aggravating circumstances found in Georgia state court was found to be invalid under the Federal Constitution. Of course, a "'mere error of state law' is not a denial of due process." Thus we need.not apply the type of federal harmlesserror analysis that was necessary in Zant . . . .

Id. at 951 n.8 (citations omitted). The plurality then noted that while state law prohibited a sentencer from considering nonstatutory aggravating circumstances, id. at 954, "nothing in the United States Constitution prohibited the trial court from considering Barclay's criminal record." Id. at 956; see also id. at 966-67 (Stevens, J., concurring in the judgment). The plurality concluded that

consideration of an aggravating circumstance invalid under state law did not render the balancing unconstitutional because "[t]here is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance." Id. at 958. Justice Stevens agreed that one valid aggravating circumstance could constitutionally support a death sentence on appeal if no statutory mitigating circumstances had been found. Id. at 967-68.

In Goode, the Supreme Court again considered the application of the Florida statute. One aggravating circumstance had been found invalid under state law in Goode, as in Barclay, but mitigating

circumstances were present in Goode, unlike Barclay. The Florida Supreme Court had indicated that it would perform a harmless error analysis only if there were no mitigating circumstances. See Barclay, 463 U.S. at 954-55. In Goode, on the other hand, the Florida Supreme Court independently rebalanced the valid aggravating circumstances with the mitigating circumstances. The United States Supreme Court recognized that "there is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered [an invalid aggravating circumstance]." Goode, 464 U.S. at 86-87. Thus, the death sentence was constitutionally permissible.

Two of the elements relied upon in Barclay and Goode are absent in this

case. First, unlike the Florida courts, the Oklahoma courts have been "unwilling to speculate as to the effect the improper aggravating circumstance . . . had on the jury's recommendation to impose the death penalty." Johnson v. State, 665 P.2d 815, 827 (Okla. Crim. App. 1983).[3] The Oklahoma Court of Criminal Appeals has held that if an aggravating circumstance used in the balancing by the sentencer is found invalid on appeal, the death penalty must be modified to life imprisonment. Id. The Oklahoma courts have refused to apply a harmless error analysis or to independently reweigh the aggravating and

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[3] At the time that Cartwright was sentenced, the Oklahoma Court of Criminal Appeals had a statutory obligation to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the

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The Oklahoma Court of Criminal Appeals affirmed Cartwright's sentence on January 7, 1985. Cartwright v. State, 695 P.2d at 548. Later that year Oklahoma modified its capital punishment statute to allow for resentencing in the event that a death penalty is set aside on appeal. Okla. Stat. Ann. tit. 21, § 701.13(E)(2) (West Supp. 1986). The Oklahoma court has held that this provision is not to be applied retroactively. Green v. State. 713 P.2d 1032, 1041 n.4 (Okla. Crim. App. 1985), cert. denied. 107 S. Ct. 241 (1986). But see Brewer v. State, 718 P.2d 354, 365-66 (Okla. Crim. App.), (holding that a provision in the 1985 amendments eliminating mandatory proportionality review is to be applied retroactively), cert. denied. 107 S. Ct. 245 (1986). Even if this provision were to be applied retroactively, the need for resentencing if an invalid aggravating circumstance was considered would put Oklahoma squarely in line with the Arkansas procedure described in Collins, 754 F.2d at 267, and would not eliminate the necessity of vacating a death sentence based in whole or in part upon consideration of an unconstitutional aggravating circumstance.

mitigating circumstances. Thus, Oklahoma has no provision for curing on appeal a sentencer's consideration of an invalid aggravating circumstance.

The Arkansas courts have also concluded that they "are not in a position to speculate about what the jury might have done if it had found only two aggravating circumstances instead of three." Williams v. State, 274 Ark. 9, 12, 621 S.W.2d 686, 687 (Ark. 1981), cert. denied, 459 U.S. 1042 (1982), quoted in Collins v. Lockhart, 754 F.2d 258, 267 (8th Cir.), cert. denied, 106 S. Ct. 546 (1985). In Collins, the Eighth Circuit held that one of the aggravating circumstances relied upon by the Arkansas courts in imposing a death sentence was unconstitutional. The court then considered the effect of this holding in

light of the presence of other valid aggravating circumstances. After examining the statutes at issue in Zant and Barclay, the court concluded:

> In Arkansas, the practice is decisively different. Here, unlike Georgia, weighing does take place. . . . Furthermore, unlike the practice in Florida, if an aggravating circumstance is held invalid for any reason, the Supreme Court of Arkansas does not engage in any sort of harmless-error analysis. The death penalty is automatically reduced to life imprisonment, unless the state chooses to retry the question of punishment to a second jury.

Collins, 754 F.2d at 267. The court then held that "[t]he reasoning underlying [Zant v.] Stephens and Barclay is therefore inapplicable here, and the presence of an invalid aggravating circumstance means that the sentence of death cannot stand." Id.

The second difference between this case and Barclay and Goode lies in the

reason that an aggravating circumstance is invalid. The plurality in Barclay emphasized that the particular aggravating circumstance at issue was invalid under state law. Barclay, 463 U.S. at 951 n.8. See also Goode, 464 U.S. at 86. Cartwright alleges that the "especially heinous, atrocious, or cruel" aggravating circumstance violates the federal constitution. We agree that "Zant and Barclay leave open the question of whether a sentencing authority that must weigh all statutory factors may consider constitutionally invalid aggravating circumstances." Special Project, Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency, 69 Cornell L. Rev. 1129, 1181 (1984).

The Supreme Court's decisions show that the particular function of an aggravating circumstance in a state's capital punishment system determines the effect of reliance upon an unconstitutional aggravating circumstance. An aggravating circumstance in Oklahoma plays a critical role in guiding the discretion of the sentencer who must decide whether a particular murder merits life imprisonment or death for the defendant. Further, the Oklahoma courts have declined to reconsider that decision on appeal when the sentencer improperly included an invalid aggravating circumstance in the balancing process.[4]

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[4] The Oklahoma Court of Criminal Appeals affirmed Cartwright's sentence on January 7, 1985. Cartwright v. State, 695 P.2d at 548. Later that year Oklahoma modified its capital punishment

In such a system, reliance upon an aggravating circumstance that is invalid under the federal constitution could affect the balance struck by the sentencer. The improper reliance is not corrected by the state appellate review

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statute to allow for resentencing in the event that a death penalty is set aside on appeal. Okla. Stat. Ann. tit. 21, § 701.13(E)(2) (West Supp. 1986). The Oklahoma court has held that this provision is not to be applied retroactively. Green v. State. 713 P.2d 1032, 1041 n.4 (Okla. Crim. App. 1985), cert. denied. 107 S. Ct. 241 (1986). But see Brewer v. State, 718 P.2d 354, 365-66 (Okla. Crim. App.), (holding that a provision in the 1985 amendments eliminating mandatory proportionality review is to be applied retroactively), cert. denied. 107 S. Ct. 245 (1986). Even if this provision were to be applied retroactively, the need for resentencing if an invalid aggravating circumstance was considered would put Oklahoma squarely in line with the Arkansas procedure described in Collins. 754 F.2d at 267, and would not eliminate the necessity of vacating a death sentence based in whole or in part upon consideration of an unconstitutional aggravating circumstance.

process and is not a matter of state law beyond the review of a federal court in a habeas corpus proceeding. A death sentence that is imposed pursuant to a balancing that included consideration of an unconstitutional aggravating circumstance must be vacated under the Eighth and Fourteenth Amendments. We therefore must consider Cartwright's allegation that Oklahoma's application of the "especially heinous, atrocious, or cruel" aggravating circumstance in this case was unconstitutionally vague.

II.

Death is qualitatively different from other punishments that can be imposed by the state. See, e.g., Ford v. Wainwright, 106 S. Ct. 2595, 2603 (1986); California v. Ramos, 463 U.S. 992, 99899 (1983). This difference necessitates

heightened scrutiny to assure that the capital sentencing decision does not violate the Eighth Amendment prohibition against cruel and unusual punishments. In a constitutional scheme borne of concern for restraining the effect of governmental action on personal life and liberty, the death sentence is the ultimate restraint. We are thus further charged with heightened responsibility for assuring that that restraint is exercised in strict conformity with the requirements of the Constitution. The Supreme Court has consistently demanded that "death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." California v. Brown, 107 S. Ct. 837, 839 (1987). The Constitution requires us to engraft

objective standards on a sentencing decision so vulnerable to subjective judgments. The difficulty of the task is reflected in the words of Justice Harlan:

> To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can fairly be understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

McGautha v. California, 402 U.S. 183, 204 (1971).

We must scrutinize the Oklahoma statutory scheme to determine whether the state has met the constitutional challenge of defining circumstances and terms that deter arbitrary and unpredictable sentencing decisions and provide adequate justification for imposing the death penalty. The question before this court is whether the

application of Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance satisfied the requirements of the Constitution in this case. We begin our consideration by examining the constitutional requirement that the discretion of a sentencer in a capital case be carefully guided.

A.

In Furman v. Georgia, 408 U.S. 238 (1972), the Supreme Court effectively invalidated the capital punishment statutes of the thirty-nine states that provided absolute discretion to the sentencer in choosing the appropriate penalty in a capital case. The Court held that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth

Amendments." Id. at 23940. Three justices concluded that a procedure for imposing the death penalty cannot allow complete and unguided discretion to the sentencer in deciding whether a particular defendant should be sentenced to death or life imprisonment. Id. at 255-57 (Douglas, J., concurring); id. at 309-10 (Stewart, J., concurring); id. at 314 (White, J., concurring). The existing procedures for the imposition of capital punishment provided "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." Id. at 313 (White, J., concurring).

Thirty-five states quickly enacted new statutes in an attempt to meet the constitutional demands. These statutes followed two different approaches. Some

states sought to eliminate the arbitrary infliction of the death penalty by making the death penalty mandatory for all defendants convicted of first degree murder. Other states sought to channel the discretion of the sentencer by requiring separate guilt and sentencing proceedings, consideration of aggravating and mitigating circumstances, and appellate review of each death sentence.

The Supreme Court decided challenges to death sentences imposed under five of these statutes on July 2, 1976. The Court held that the death penalty is not cruel and unusual punishment per se. Gregg v. Georgia, 428 U.S. 153, 168-87 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); id. at 226 (White, J., concurring in the judgment) (citing Roberts v. Louisiana. 428 U.S. 325, 350-

56 (1976) (White, J., with Burger, C.J., Blackmun and Rehnquist, JJ., dissenting)). The Court further found that the Georgia "guided discretion" statute satisfied the Furman mandate "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg, 428 U.S. at 189 (opinion of Stewart, Powell, and Stevens, JJ.). The statute also "focus[ed] the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant." Id. at 206. See also Proffitt v. Florida, 428 U.S. 242 (1976)

(upholding the constitutionality of the Florida guided discretion statute); Jurek v. Texas. 428 U.S. 262 (1976) (upholding the constitutionality of the Texas guided discretion statute). In contrast, the Court in Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. at 325, held that the mandatory death penalty statutes of North Carolina and Louisiana were invalid because they failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death," and "simply papered over the problem of unguided and unchecked jury discretion." Woodson, 428 U.S. at 302-03 (opinion of Stewart, Powell, and Stevens, JJ.).

As the Supreme Court recently explained:

> [O]ur decisions since Furman have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the judgment as to whether the circumstances of a particular case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

McCleskey v. Kemp, 107 S. Ct. 1756, 1774 (1987) (emphasis added).

B.

An aggravating circumstance performs a crucial function in a capital

punishment statute that endeavors to channel the discretion of the sentencer. "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." Spaziano v. Florida, 468 U.S. 447, 460 (1984). An aggravating circumstance is a standard established by the legislature to guide the sentencer in choosing between life imprisonment and the death penalty. In essence, an aggravating circumstance is a legislative determination that "this murder is different." This difference "must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty

of murder." Zant. 462 U.S. at 877 (footnote omitted). A statutorily designated aggravating circumstance accomplishes this by "identify[ing] special indicia of blameworthiness or dangerousness in the killing." Weisberg, Deregulating Death. 1983 Sup. Ct. Rev. 305, 329 (1983). Thus, "the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." Gregg, 428 U.S. at 192 (opinion of Stewart, Powell, and Stevens, JJ.).

The narrowing function of an aggravating circumstance demands that such a factor be capable of objective determination. Thus, aggravating circumstances must be described in terms

that are commonly understood, interpreted and applied. To truly provide guidance to a sentencer who must distinguish between murders, an aggravating circumstance must direct the sentencer's attention to a particular aspect of a killing that justifies the death penalty. Many aggravating circumstances require distinctions among murders that are relatively easy for a sentencer to make: more than one person was killed by the acts of the defendant, Ky. Rev. Stat. § 532.025(2)(a) (6) (Michie/Bobbs-Merrill Supp. 1986); the victim was pregnant, Del. Code. Ann. tit. 11, § 4209(e)(1) (p) (Supp. 1986); or the murder was committed by a hidden explosive device. Cal. Penal Code § 190.2(a) (4) (West Supp. 1987).

The Supreme Court has warned, however, that a standard could be so vague that it would "fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur." Zant, 462 U.S. at 877 (quoting Gregg, 428 U.S. at 195 n.46). Thus, if "an aggravating circumstance is defined and applied so broadly that it conceivably could cover every first degree murder, then it obviously cannot fulfill its constitutional responsibilities to eliminate the consideration of impermissible factors and to provide a recognizable and meaningful standard for choosing the few who are to die." Rosen, The "Especially Heinous" Aggravating

Circumstance in Capital Cases -- The Standardless Standard. 64 N.C.L. Rev. 941, 954 (1986) [hereinafter The Standardless Standard] (footnote omitted).

C.

The Oklahoma capital punishment statute includes as an aggravating circumstance that "[t]he murder was especially heinous, atrocious, or cruel." Okla. Stat. Ann. tit. 21, § 701.12(4) (West 1983). Twenty-three other states have a similar aggravating circumstance, using such terms as "outrageously or wantonly vile," "heinous," "horrible," "brutal," "depraved," "cruel," "inhuman," and "atrocious" to describe a particularly offensive crime. See Rosen, The Standardless Standard. 64 N.C.L. Rev. at 943 n.7. Although the Supreme

Court has not held such language to be facially unconstitutional, the Court has "not stopped at the face of a statute, but [has] probed the application of statutes to particular cases." McCleskey, 107 S. Ct. at 1773. A state court interpretation of the statutory language of an aggravating circumstance can be "so broad that it may have vitiated the role of the aggravating circumstance in guiding the sentencing jury's discretion." Id.

Cartwright alleges that Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance was applied in an unconstitutionally vague and overbroad manner in this case. In deciding this claim, we first review the Supreme Court decisions involving challenges to statutory provisions similar to the

"especially heinous, atrocious, or cruel" aggravating circumstance at issue in this case. We then turn to the evolution of the meaning of "especially heinous, atrocious, or cruel" as construed by the Oklahoma Court of Criminal Appeals. Finally, we determine whether that court's application of the aggravating circumstance in this case satisfies the demands of the United States Constitution.

The Supreme Court first considered challenges to this type of aggravating circumstance in Gregg and Proffitt. Although the murder in Gregg had not been found to satisfy the aggravating circumstance that the offense was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated

battery to the victim," see Ga. Code Ann. § 17-10-30(b) (7) (1982), the petitioner asserted that the alleged vagueness of that provision rendered the entire Georgia statutory sentencing procedure unconstitutional. The Supreme Court disagreed, recognizing that it is "arguable that any murder involves depravity of mind or an aggravated battery," but concluding that "this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." Gregg, 428 U.S. at 201 (opinion of Stewart, Powell, and Stevens, JJ.) (footnote omitted). In Proffitt, the trial judge found that the murder was "especially heinous, atrocious, or cruel." See Fla. Stat. Ann. § 921.141(5)

(h) (West 1985). The Florida courts had construed that provision to apply only to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). The Supreme Court held that by so limiting the statutory description, the state provided adequate guidance to the sentencer. Proffitt, 428 U.S. at 255-56.

The Supreme Court reviewed the Georgia courts' application of the aggravating circumstance in Godfrey v. Georgia, 446 U.S. 420 (1980). Justice Stewart observed:

> [I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. . . . It must channel the sentencer's discretion

> by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death."

Id. at 428 (plurality opinion of Stewart, J., with Blackmun, Powell, and Stevens, JJ.) (footnotes and citations omitted). See also id. at 433 (Marshall, J., with Brennan, J., concurring in the judgment) (reiterating their belief that "the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments.") The jury had found only that the offense was "outrageously or wantonly vile, horrible and inhuman." Id. at 428 (footnote omitted). Because "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence . . . the jury's

interpretation of [the aggravating circumstance] can only be the subject of sheer speculation." Id. at 428-29.

The plurality also found that the jury's uncontrolled discretion was not cured on appeal in the state courts. While in cases preceding Godfrey the Georgia Supreme Court had applied a narrowing construction of the statutory provision, in Godfrey the state court simply asserted that the verdict was 'factually substantiated.'" Id. at 432. Therefore, the plurality considered "whether, in light of the facts and circumstances of the murders . . . the Georgia Supreme Court can be said to have applied a constitutional construction" of the statutory phrase. Id. The plurality concluded that "[t]here is no principled way to distinguish this case, in which

the death penalty was imposed, from the many cases in which it was not." Id. at 433. Accordingly, the Court reversed the sentence of death.

The Oklahoma Court of Criminal Appeals has reviewed almost thirty cases in which the death penalty was imposed after the jury concluded that a murder was "especially heinous, atrocious, or cruel." The court originally held that this aggravating circumstance must be applied according to the narrowing construction approved in Proffitt, but Oklahoma has since abandoned that construction.

In Eddings v. State, 616 P.2d 1159 (Okla. Crim. App. 1980), rev'd on other grounds sub nom. Eddings v. Oklahoma, 455 U.S. 104 (1982), the Oklahoma Court of Criminal Appeals considered the

"especially heinous, atrocious, or cruel" provision for the first time. The court recognized that "[t]he aggravating circumstance in the statute is for murders that are especially heinous, atrocious and cruel, and obviously the Legislature must have intended to reach killings which are 'out of the ordinary.'" Id. at 1167 (emphasis original). The court then quoted the following passage from the narrowing construction of the Florida court that the Supreme Court had approved in Proffitt:

> "[W]e feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of

> others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies the conscienceless or pitiless crime which is unnecessarily torturous to the victim."

Eddings. 616 P.2d at 1167-68 (quoting Dixon. 283 So.2d at 9). The court concluded that the killing of a police officer in the performance of his duties satisfied this standard,[5] and that the

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[5] The United States Supreme Court vacated the death sentence in Eddings because the state court had failed to consider evidence of the defendant's unhappy upbringing and emotional disturbance as a mitigating factor. Eddings v. Oklahoma. 455 U.S. 104, 113-17 (1982). The Court also noted in dicta that the state court had held that the murder of a police officer in the performance of his duties is "heinous, atrocious, or cruel." In response, the Court said, "we doubt that the trial judge's understanding and application of this aggravating circumstance conformed to that degree of certainty required by our decision in Godfrey." Id. at 109 n.4.

testimony at trial regarding the defendant's manner indicated that the killing was "'designed to inflict a high degree of pain with utter indifference to . . . the suffering of others.'" Eddings, 616 P.2d at 1168 (quoting Dixon, 283 So.2d at 9).

Since Eddings, the Oklahoma court has consistently followed that part of the narrowing construction approved in Proffitt providing that "'heinous' means 'extremely wicked or shockingly evil'. 'atrocious' means 'outrageously wicked and vile'; and 'cruel' imports a design to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.'" Brooie v. State. 695 P.2d 538, 542 (Okla. Crim. App. 1985) (quoting Stafford v. State, 665 P.2d 1205, 1217 (Okla. Crim. App.

1983), vacated on other grounds. 467 U.S. 1212 (1984)). The court has frequently approved jury instructions using this language. See, e.g., Davis v. State. 665 P.2d 1186, 1202 (Okla. Crim. App.), cert. denied. 464 U.S. 865 (1983); Burrows v. State. 640 P.2d 533, 542 (Okla. Crim. App. 1982), cert. denied. 460 U.S. 1011 (1983); Chaney v. State. 612 P.2d 269, 280 (Okla. Crim. App. 1980), cert. denied. 450 U.S. 1025 (1981).

The court has also quoted the passage in Eddings -- originally approved in Proffitt. that limits this aggravating circumstance to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Nuckols v. State. 690 P.2d 463, 471-73 (Okla. Crim. App. 1984), cert. denied. 471 U.S. 1030

(1985); Boutwell v. State, 659 P.2d 322, 329 (Okla. Crim. App. 1983); Burrows, 640 P.2d at 542.[6] The Oklahoma Court of Criminal Appeals has never held that this

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[6] The uniform jury instruction which defines "heinous, atrocious, or cruel" provides:

> As used in these instructions, the term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.
>
> The phrase "especially heinous, atrocious, or cruel" is directed to those crimes where the death of the victim was preceded by torture of the victim or serious physical abuse.

Okla. Uniform Jury Instruction Cr. No. 436. This instruction has been used on occasion. See, e.g., State v. Liles, No. CRF-82-4268 (Okla. County Dist. Ct. May 18, 1983) (Instruction No. 3), aff'd, 702 P.2d 1025 (Okla. Crim. App. 1985), cert. denied, 106 S. Ct. 2291 (1986), quoted in Supplement to Record, Mar. 3, 1987, at 4.

language is mandatory, however, thus rejecting part of the narrowing construction approved in Proffitt and seemingly adopted in Eddings. In Irvin v. State, 617 P.2d 588, 598-99 (Okla. Crim. App. 1980), the court held that it was not mandatory to include the "unnecessarily torturous to the victim" language in the instructions to the jury. Three years later, in Davis, 665 P.2d at 1202-03, the court rejected the argument that a substantial amount of torture must precede the killing for a murder to be "especially heinous, atrocious, and cruel." Then, in Nuckols, the court held:

> [Our] cases make clear that suffering of the victim is not the major factor we consider regarding this aggravating circumstance. . . . [T]he "manner of the killing" is a relevant consideration, as well as the circumstances surrounding the homicide. We also have examined the killer's attitude

> to learn if it was especially pitiless or cold.

690 P.2d at 472 (citations omitted). The court concluded that "both the circumstances leading up to, and the manner in which the homicide was committed, [are] sufficiently atrocious to be at the 'core' of the circumstance." Id. at 472-73.

The Oklahoma Court of Criminal Appeals then decided Cartwright's appeal in this case. The jury at Cartwright's trial had been instructed that "the term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others." On appeal the court noted that the statute is written in disjunctive

language -- the murder must be especially heinous, atrocious, or cruel -- so a murder need only fall within one of these terms as defined by the court. Cartwright v. State. 695 P.2d at 554. The court then held that while torture is sufficient to satisfy this aggravating circumstance, it is not necessary. Id. The court described some of the factors that had supported this aggravating circumstance in previous cases: the defendant knew the victim and planned the murder well in advance, Boutwell, 659 P.2d at 329; the defendant shot his victims several times, Davis, 665 P.2d at 1202-03; the defendant shot three persons in a barroom for no apparent reason, Jones v. State, 648 P.2d 1251, 1259 (Okla. Crim. App. 1982), cert. denied, 459 U.S. 1155 (1983); and the defendant

kidnapped two women, demanded $500,000 in ransom, and murdered and buried the women. Chaney, 612 P.2d at 280, 282. The court wrote:

> Therefore, we decline to consider this murder as though it occurred in a vacuum. We deem it proper to gauge whether the murder was heinous, atrocious or cruel in light of the circumstances attendant to the murder, including the evidence that the appellant had previously expressed his intentions to "get even" with the Riddles; that he probably had been inside the Riddles' home as early as 11:13 a.m. on the day of the murder; that he either lay in wait for them, or returned under the cover of darkness, and broke into their home to stalk them; that he attacked Charma immediately upon being discovered; that having gunned her down, he went into the living room and slayed Hugh; that Hugh doubtless heard the shotgun blasts which tore through Charma's body; that he quite possibly experienced a moment of terror as he was confronted by the appellant and realized his impending doom; that the appellant again attempted to kill Charma in a brutal fashion upon discovery that his first attempt was unsuccessful; that he attempted to conceal his deeds by

> disconnecting the telephone and posting a note on the door; and that his apparent attempt to steal goods belonging to the Riddles by loading them in their vehicle was prevented only by the arrival of the police officers, adequately supported the jury's finding. See as well our discussion in Nuckols v. State. 690 P.2d 463, 55 O.B.A.J. 2259 (Okl. Cr. 1984), of the consideration to be given to the manner of a killing in determining whether a murder is heinous, atrocious or cruel.

Cartwright v. State, 695 P.2d at 554 (emphasis added).

The construction of "especially heinous, atrocious, or cruel" employed by the Oklahoma Court of Criminal Appeals in this case is a departure from the construction initially adopted in Eddings. The court no longer limits this aggravating circumstance to murders that are "unnecessarily torturous to the victim," one of the standards adopted in Eddings and previously approved by the

Supreme Court in Proffitt. The court now relies upon the definitions of the terms "heinous," "atrocious," and "cruel," and upon the manner of the killing, the attitude of the killer, the suffering of the victim, and all of the circumstances surrounding the murder. We must decide whether this construction serves to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey, 446 U.S. at 428 (footnotes omitted).

Oklahoma has defined "heinous" as "extremely wicked or shockingly evil" and "atrocious" as "outrageously wicked and vile." These definitions fail for the same reason that the conclusory statement

that the offense was "outrageously wicked and vile, horrible and inhuman" was inadequate in Godfrey: "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." 446 U.S. at 428. A limiting construction of this aggravating circumstance is necessary precisely because adjectives such as "wicked" or "vile" can fairly be used to describe any murder. These terms simply elude objective definition. A state does not channel the discretion of a sentencer or distinguish among murders when "heinous" and "atrocious" are defined only as "extremely wicked and shocking" and "outrageously wicked and vile." "Heinous" and "atrocious" have not been described in terms that are commonly understood,

interpreted, and applied. Vague terms do not suddenly become clear when they are defined by reference to other vague terms.

The definition of "cruel" as "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others" is somewhat more precise, but there are two reasons why this definition does not now serve as an adequate standard. First, the Oklahoma court has clearly rejected the argument.that the suffering of the victim is the major factor to be considered under this aggravating circumstance. See Nuckols, 690 P.2d at 472; see also Green v. State. 713 P.2d 1032, 1044 (Okla. Crim. App. 1985), cert. denied. 107 S. Ct. 241 (1986). Second, because the Oklahoma court has emphasized

that a murder need only be especially heinous, atrocious, or cruel, see Cartwright v. State, 695 P.2d at 544, even if the definition of cruel was adequate, the vague definitions of atrocious and heinous would still allow a sentencer to rely upon an unconstitutionally vague standard in determining that a murder satisfies this aggravating circumstance. The court no longer limits the application of the "especially heinous, atrocious, or cruel" aggravating circumstance to those crimes that are "unnecessarily torturous to the victim." See id.

According to the state, the terms "heinous," "atrocious," and "cruel," coupled with their definitions, direct the attention of the sentencer to the manner of the killing and the attitude of

the killer. Transcript of oral argument at 19. The Oklahoma court has said that the attitude of the killer, the manner of the killing, the suffering of the victim, and all of the circumstances of the offense are relevant considerations in determining whether a murder was "especially heinous, atrocious, or cruel." See Nuckols, 690 P.2d at 472; see also Liles v. State, 702 P.2d 1025, 1032 (Okla. Crim. App. 1985), cert. denied, 106 S. Ct. 2291 (1986). We examine each factor in turn.

In several cases the Oklahoma court has cited the killer's "conscienceless" or "pitiless" attitude or indifference to the suffering of the victim in supporting a finding that a murder was "especially heinous, atrocious, or cruel." See, e.g., Green, 713 P.2d at 1044-45; Cooks v.

State, 699 P.2d 653, 661 (Okla. Crim. App.), cert. denied, 106 S. Ct. 268 (1985); Boutwell, 659 P.2d at 329; Jones, 648 P.2d at 1259. But as the court has recognized, the attitude of the killer is best evidenced by what the killer has done. See Green, 713 P.2d at 1044-45. See also Nuckols, 690 P.2d at 473 ("the circumstances of this killing, coupled with appellant's comments . . . reveal this crime was shockingly pitiless"). Thus, the inquiry into the killer's attitude inevitably collapses into a consideration of the manner of the killing, the suffering of the victim, or the circumstances of the offense.

"[T]he manner of death in one case may certainly be distinguishable from another in the degree of atrocity or cruelty." Chaney, 612 P.2d at 280. The

unanswered question, however, is what manner of killing makes a murder "especially heinous, atrocious, or cruel." The Oklahoma court has never explained why one manner of killing is "especially heinous, atrocious, or cruel" and why another manner of killing is not. The cases in which the court has found the manner of the killing to support this aggravating circumstance do not reveal any pattern or consistency in the way in which the murder was committed. See, e.g., Green, 713 P.2d at 1035 (defendant stabbed an inmate seventeen times in the chest and the back with a butcher knife and slashed in the throat); Cooks, 699 P.2d at 656 (defendant raped, beat, and suffocated an 87-year-old disabled woman); Nuckols, 690 P.2d at 465, 472-73 (defendant struck the victim with a ball

peen hammer and kicked him repeatedly); Jones, 648 P.2d at 1253-54 (defendant repeatedly shot three persons in a bar). But see Odum v. State, 651 P.2d 703, 707 (Okla. Crim. App. 1982) ("the manner of killing cannot be said to lie at the 'core' of the statutory aggravating circumstance" where the defendant shot the victim once in the neck and rendered him unconscious immediately). Further, the Oklahoma court has held a torture murder is not the only kind that is "especially heinous, atrocious, or cruel." See Cartwright v. State, 695 P.2d at 554. The court has not identified which manners of killing are not "especially heinous, atrocious, or cruel." Therefore, the court's reliance upon the manner of the killing does not serve to distinguish among those murders

tha' are punishable by death and those that are not.

The suffering of the victim has been relied upon in several instances in which this aggravating circumstance was found. See, e.g., Liles. 702 P.2d at 1032; Stafford, 665 P.2d at 1217; Burrows, 640 P.2d at 543. On one occasion, the absence of any suffering by the victim led the state appeals court to reverse a finding that a murder was "especially heinous, atrocious, or cruel." Odum, 651 P.2d at 707. Nonetheless, the court has held that it is not necessary for the victim to have suffered for a murder to satisfy this aggravating circumstance. See Nuckols, 690 P.2d at 472. Suffering is sufficient but not required.

The Oklahoma Court of Criminal Appeals, then, has said that the attitude

of the killer, the manner of the killing, or the suffering of the victim can support this aggravating circumstance, but the court has refused to hold that any one of those factors must be present for a murder to satisfy this aggravating circumstance. The underlying position of the Oklahoma court appears to be that it can simply review the circumstances of the murder and divine whether the murder was "especially heinous, atrocious, or cruel." See Cartwright v. State, 695 P.2d at 554; see also Nuckols, 690 P.2d at 472, quoted in Green, 713 P.2d at 1044. In numerous cases the court has affirmed a finding that a murder was "especially heinous, atrocious, or cruel" with no more than a statement that "the facts adequately support" the aggravating circumstance. Ake v. State, 663 P.2d 1,

11 (Okla. Crim. App. 1983), rev'd on other grounds, 470 U.S. 68 (1985). See also, e.g., Coleman v. State, 668 P.2d 1126, 1138 (Okla. Crim. App. 1983), cert. denied, 464 U.S. 1073 (1984); Hays v. State, 617 P.2d 223, 231-32 (Okla. Crim. App. 1980).

We agree that all of the circumstances surrounding a murder must be examined to determine whether the murder was "especially heinous, atrocious, or cruel," but there must be some objective standard that specifies which circumstances support such a determination. Consideration of all the circumstances is permissible; reliance upon all of the circumstances is not. When the sentencer is free to rely upon any particular event that it believes makes a murder "especially heinous,

atrocious, or cruel," the meaning that the sentencer attached to this provision "can only be the subject of sheer speculation." Godfrey, 428 U.S. at 429. Indeed, courts that have considered similar aggravating circumstances have held:

> [A murder] can be especially heinous because the victim is too young, too old, or because the defendant chose his victims so that they were not too young or too old. If the defendant killed for no reason, the murder is especially heinous, as is a murder committed for a reason the appellate court does not like. A killing is especially heinous if the victim is aware of the impending death, and also if the killing is done without warning.

Rosen, The Standardless Standard. 64 N.C.L. Rev. at 989 (footnotes omitted). The discretion of a sentencer who can rely upon all of the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in

Furman. No objective standards limit that discretion.

In this case the court described the events surrounding the murder including the petitioner's motive for the murder, the preparation for the attack, the attack itself, and the petitioner's efforts to conceal his activities. The court then held that these events "adequately supported the jury's finding." Cartwright v. State, 695 P.2d at 554. This conclusion is no different than the finding that the verdict was "factually substantiated" that was held inadequate in Godfrey. 446 U.S. at 419. We therefore hold that the Oklahoma Court of Criminal Appeals failed to apply a constitutionally required narrowing construction of "especially heinous, atrocious, or cruel" in this case.

III.

The question remains whether this court can sua sponte adopt a constitutionally permissible narrowing construction of "especially heinous, atrocious, or cruel" and apply that construction to the facts of this case.

In Godfrey, the plurality characterized the failure of the state court to apply a proper narrowing construction as an aberrational lapse. 446 U.S. at 430-32. But see id. at 435-36 (Marshall, J., concurring in the judgment) (arguing that the Georgia court had either abandoned or consistently broadened its previous narrowing construction of the statutory provision). The plurality then applied the narrowing construction usually employed by the Georgia court to the facts of the murders

in that case. The Oklahoma court, on the other hand, has now explicitly denied the necessity of finding that a murder was "unnecessarily torturous to the victim." Compare Cartwright v. State, 695 P.2d at 554 (torture is sufficient but not necessary) with Eddings, 616 P.2d at 1168. ("What is intended [is] the conscienceless or pitiless crime which is unnecessarily torturous to the victim.") The Oklahoma court has also rejected the argument that the suffering of the victim is the primary factor to be considered in deciding whether this aggravating circumstance can be applied to a particular murder. See Nuckols, 690 P.2d at 472; Green, 713 P.2d at 1044. The remaining "standards" advanced by the Oklahoma court are unconstitutionally vague. Therefore, unlike the Court in

Godfrey, there is no constitutionally adequate narrowing construction adopted by the state courts that we can apply to the instant case.

We do not decide what narrowing construction of the "especially heinous, atrocious, or cruel" aggravating circumstance would satisfy the constitutional requirements. That determination must be made by the state in the first instance as it construes its own laws in light of constitutional requirements. The Supreme Court has pointedly declined the opportunity "to dictate to the State the particular substantive factors that should be deemed relevant to the capital sentencing decision." Ramos, 463 U.S. at 999 (emphasis original). The Ramos Court concluded:

> It would be erroneous to suggest, however, that the Court has imposed no substantive limitations on the particular factors that a capital sentencing jury may consider in determining whether death is appropriate. In Gregg itself the joint opinion suggested that excessively vague sentencing standards might lead to the arbitrary and capricious sentencing patterns condemned in Furman. . . .
>
> Beyond these limitations, as noted above, the Court has deferred to the State's choice of substantive factors relevant to the penalty determination.

Id. at 1000-01.

We have held that the construction of the "especially heinous, atrocious, or cruel" aggravating circumstance applied by the Oklahoma Court of Criminal Appeals in this case is unconstitutionally vague. We will not presume to specify "the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to

the sentencing decision." Id. at 1000 (emphasis original) (quoting Gregg, 428 U.S. at 192).

IV.

We make no judgment as to whether the attack in this case was "especially heinous, atrocious, or cruel." We hold only that the Oklahoma courts failed to guide the sentencer's discretion with constitutionally adequate standards.

The order of the District Court for the Eastern District of Oklahoma is affirmed with respect to the denial of the writ but reversed with respect to its denial of all further relief. The case is remanded to the district court with directions to enter judgment that the writ of habeas corpus is denied but, as

law and justice require,[7] the death sentence of petitioner is invalid under the Eighth and Fourteenth Amendments to the United States Constitution. The execution of the petitioner under this invalid death sentence is enjoined. This judgment is without prejudice to further proceedings by the state for redetermination of the sentence on the conviction.[8]

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[7] The federal habeas statute empowers the federal courts to make disposition of the matter "as law and justice require." 28 U.S.C. § 2243; Carafas v. LaVallee, 391 U.S. 234, 239 (1968); Chaney v. Brown, 730 F.2d 1334, 1358 (10th Cir.), cert. denied, 469 U.S. 1090 (1984).

[8] We express no opinion concerning the constitutionality of a retroactive application of Oklahoma's new remand procedure. See Dutton v. Brown, 812 F.2d 593, 602 n.10 (10th Cir. 1987) (en banc), petition for cert. filed, 55 U.S.L.W. 3747 (U.S. May 5, 1987).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

WILLIAM THOMAS CARTWRIGHT, Petitioner,	)	
-vs-	)	No. 86-54-C
GARY D. MAYNARD, Warden, Oklahoma State Penitentiary at McAlester, Oklahoma, Respondent,	)	
and	)	
MICHAEL C. TURPEN, Attorney General for Oklahoma, Additional Respondent.	)	

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AND DENYING PETITIONER'S APPLICATION FOR STAY OF EXECUTION

This is a proceeding for writ of habeas corpus by the above-named petitioner, who is a state prisoner incarcerated at the Oklahoma State Penitentiary at McAlester, Oklahoma.

Petitioner claims that his detention pursuant to the judgment and sentence of the District Court of Muskogee County, State of Oklahoma, in Case No. CRF-82-192, is unlawful. After trial by jury on November 12, 1982, for the offense of Murder in the First Degree, and a second count of Shooting with Intent to Kill, petitioner was sentenced to death by lethal injection on the murder count conviction and sentenced to serve a 75-year sentence for the offense of Shooting with Intent to Kill.

As ground for relief, petitioner sets forth five allegations of error, which the Court has summarized as follows:

> I. Petitioner's pre-trial request for a complete psychological evaluation was improperly denied by the trial court.
>
> II. The death penalty as applied to the petitioner, Cartwright, is

cruel and unusual punishment and forbidden by the Eighth Amendment to the Constitution of the United States.

III. The trial court's method and procedure of selecting jurors violated petitioner's rights under the Sixth and Fourteenth Amendments to the Constitution.

IV. Petitioner was denied effective assistance of counsel, in violation of his Sixth and Fourteenth Amendment rights under the United States Constitution.

V. The state trial court violated Petitioner's right to due process by summarily denying petitioner's application for post-conviction relief.

Petitioner appealed his conviction in Case No. CRF-82-192 to the Oklahoma Court of Criminal Appeals, which affirmed the conviction at Cartwright v. State, 695 P.2d 548, (Okla. Cr. 1985). The United States Supreme Court denied certiorari in Case No. 84-67-14 on July 1, 1985. This Court, on August 19, 1985, dismissed a habeas corpus action filed by petitioner

for failure to exhaust state remedies in Case No. 85-513. Thereafter, petitioner filed a request for post-conviction relief before the District Court of Muskogee County, raising essentially the same issues that are now before the Court. The request for post-conviction relief was denied by the state trial court on August 22, 1985, and the trial court's denial was affirmed by the Oklahoma Court of Criminal Appeals on October 23, 1985, in Cartwright v. State, 708 P.2d 592 (Okla. CR 1985).

The Respondent has filed a response by and through the Attorney General of the State of Oklahoma. Included with the Attorney General's Response was a complete trial transcript of Case No. CRF-82-192, transcript of pre-trial motions, sentencing transcript, and the

transcript of the state court post-conviction proceedings. The Respondent and Petitioner agree that all state court remedies have been exhausted.

The Court has carefully scrutinized the following: (1) the petition for habeas corpus relief; (2) the Response filed on behalf of the Respondent; (3) the entire transcript of the trial proceedings, including the motion hearings, the jury voir dire and the sentencing; (4) the transcript of the post-conviction proceedings; (5) the opinion of the Oklahoma Court of Criminal Appeals, affirming the court on the trial and affirming the denial of post-conviction relief. Therefore, the Court, for the reasons set forth below, has determined that an evidentiary hearing is not necessary or required to resolve the

issues raised in this matter.

The United States Supreme Court has stated that federal courts must grant an evidentiary hearing to a habeas corpus applicant if: (1) the merits of a factual dispute were not resolved in a state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the finding procedure in state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) material facts were not adequately developed at state court hearings; or (6) for any reason it appears that the state trier of fact did not afford the applicant a full and fair fact hearing. Townsend v. Sain, 372 U.S. 293, 313 (1963).

The records and transcripts before

this court conclusively establish that the state fact finding procedures were more than adequate to afford a full and fair hearing, that the state trier of fact did afford the applicant a full and fair fact hearing, and that all necessary material facts were adequately developed at the state court hearings. Moreover, the record and transcripts establish beyond doubt that the merits of all factual disputes were resolved in the state hearings, and that the state factual determinations are sufficiently supported by the record as a whole.

Accordingly, the Court finds that the record and transcripts of the state court proceedings provide all the necessary data for a satisfactory determination of the issues raised in the petition, and an evidentiary hearing is not required.

Townsend v. Sain, supra, at 318; Sumner v. Mata, 449 U.S. 530 (1981) (Sumner I), Sumner v. Mata, U.S. 591 (1982) (Sumner II).

As stated above, each and every issue raised in the petition has been previously raised and fully addressed during the trial and/or the post-conviction proceeding, as well as during either or both of the appeals resulting from those trial court proceedings.

The law applicable to the issues has been exhaustively discussed and treated in the state proceedings, and the briefs submitted by the petitioner and respondents.

Petitioner's propositions will be treated separately, except where indicated otherwise.

PROPOSITION I

PETITIONER'S PRE-TRIAL REQUEST FOR A COMPLETE PSYCHOLOGICAL EVALUATION WAS IMPROPERLY DENIED BY THE TRIAL COURT.

Petitioner relies almost exclusively on Ake v. Oklahoma, 470 U.S. _____, 105 S.Ct. 1087 (1985), to support his contention that he was denied his basic constitutional rights when the trial court refused to grant his request for a complete psychological evaluation at State expense. After reviewing all the records and transcripts before the Court, it is clear that the facts in the case at bar are distinguishable from those found in the Ake case. This Court agrees with the Oklahoma Court of Criminal Appeals analysis of the Ake case, Cartwright v. State, 708 P.2d 592 (Okla. CR 1985), where that Court stated:

"In Ake, the Supreme Court applied

the standards discussed in its decisions to the facts, and concluded that Ake's sanity was likely to be a significant factor in his defense:

'For one, Ake's sole defense was that of insanity. Second, Ake's behavior at arraignment just four months after the offense, was so bizarre as to prompt the trial judge, sua sponte, to have him examined for competency. Third, a state psychiatrist shortly thereafter found Ake to be incompetent to stand trial, and suggested that he be committed. Fourth, when he was found to be competent six weeks later, it was only on the condition that he be sedated with large doses of Thorazine three times a day, during trial. Fifth, the psychiatrists who examined Ake for competency described to the trial court the severity of Ake's mental illness less than six months after the offense in question, and suggested that his mental illness might have begun many years earlier. Ap. 35. Finally, Oklahoma recognizes a defense of insanity, under which the initial burden of producing evidence falls on the defendant. Ake, at 470 U.S. _____, 105 S.Ct. at 1098, 84 L.E.2d at 68.'

"In contrast, the petitioner did not use the insanity defense, he did not display any bizarre

behavior, an examination by the state psychiatrist showed that he was competent to stand trial and was able to assist in his defense, and finally stated that further observation was unnecessary. Although the petitioner complained of recurring blackouts, a physician who examined him three days after the crimes could not find anything abnormal even though his attention was specifically called to the 'soft spot' on the petitioner's head alleged to be the reason the blackouts occurred."

The facts of the instant case do not indicate that petitioner, Carwright's, sanity was a viable issue upon which he could have based his defense. To the contrary, the evidence of record establishes a strong factual basis for the trial court's refusal to grant petitioner's request for further psychological evaluation.

PROPOSITION II

THE DEATH PENALTY AS APPLIED TO THE PETITIONER, CARTWRIGHT, IS CRUEL AND UNUSUAL PUNISHMENT AND FORBIDDEN BY THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner's claim that the death penalty is per se cruel and unusual

punishment in violation of the Eighth and Fourteenth Amendments to the Constitution has no merit. Gregg v. Georgia, 428 U.S. 153 (1976) and Proffitt v. Florida, 428 U.S. 242 (1976).

Petitioner's further contention that the trial court failed to adequately instruct the jury is not supported by the record. To the contrary, the trial court gave instructions that have been approved and sanctioned by the courts in Proffitt, supra, and Davis v. State, 665 P.2d 1186 (Okla. CR 1983).

Further, this Court has reviewed the Oklahoma Statutes, 21 O.S. § 701.7-701.15, implemented to overcome the constitutional problems outlined in Furman v. Georgia, 408 U.S. 238 (1972), as well as the case law applying said statutes, and finds that the statutes

have been uniformly applied by the Oklahoma courts. Cartwright v. State, 708 P.2d 592 (Okla. CR 1985).

In regard to Godfrey v. Georgia, 446 U.S. 420 (1980) cited by petitioner, this Court has reviewed that case and determined that the Supreme Court was called upon to address a narrow issue involving a Georgia death penalty statute that contained language clearly distinguishable from the Oklahoma Statutes.

PROPOSITION III

THE TRIAL COURT'S METHOD AND PROCEDURE OF SELECTING JURORS VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

This Court's review of the voir dire of the jurors and panel for petitioner's case indicate to this Court that the state trial court did meet the standards

set forth in Witherspoon v. Illinois, 391 U.S. 510 (1968), Wainwright v. Witt, ___ __ U.S. _____, 105 S.Ct. 844, 83 L.E.2d 841 (1985).

In Patton v. Yount, ___ U.S. ___ , 104 S.Ct. 2885 (1984), Wainwright, supra, the Court held that whether jurors have opinions that disqualify them is a question of fact to be determined by the state trial court. Further, the Court in Patton stated in holding that the trial court's decision as to the qualification of jurors was entitled to a presumption of correctness that:

> "There are good reasons to apply the statutory presumption of correctness to the trial court's resolution of these questions. First, the determination has been made only after an often extended voir dire proceeding designed specifically to identify biased veniremen. It is fair to assume that the method we have relied on since the beginning, e.g., United States v. Burr, 25 F.Cas. 49, 51

> (CCD Va. 1807) (Marshall, C.J.), usually identifies bias. Second, the determination is essentially one of credibility, and therefore largely one of demeanor. As we have said on numerous occasions, the trial court's resolution of such questions is entitled, even on direct appeal, to 'special deference'. E.g., Bose Corp. v. Consumers Union of U.S., Inc., U.S. ___, ___ (1984). The respect paid such findings in a habeas proceeding certainly should be no less."

The Court finds therefore that the petitioner, in this proposition, failed to raise an error which amounted to deprivation of a constitutional right.

PROPOSITION IV

> **PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION."**

Petitioner's claim of ineffective assistance of counsel is without merit. The record before the Court indicates that petitioner's trial counsel in

representing petitioner filed a Motion to Suppress Evidence, Motion for Severance, Motion for Psychological Evaluation and Motion to Change Venue, which resulted in the case being tried in another county, rather than the county where the alleged murder took place. In addition, the trial record reflects that the defense counsel effectively cross-examined prosecution witnesses, demurred to the evidence of the State and called thirteen witnesses on behalf of the petitioner during the course of the trial. This Court finds that the conduct of petitioner's court-appointed counsel can be very favorably compared to the defense attorney in United States vs. Fitts, 576 F.2d 837, 839 (10th Cir. 1978), where the Court stated:

> "The record reflects that counsel conducted the defense in an acceptable manner. He challenged testimony of the government witnesses on cross-examination, interposed appropriate objections, called and adequately examined a defense witness to refute the incriminating testimony of Jost and presented arguments which demonstrated his knowledge of the law and facts in this case."

The burden on the petitioner to establish a claim of ineffective assistance of counsel is great and neither hindsight nor success is a proper standard for determining counsel's effectiveness, Ellis v. Oklahoma, 430 F.2d 1352 (10th Cir. 1970). Further, the Supreme Court in Strickland v. Washington, _____ U.S. _____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), held in commenting on the burden of the petitioner that:

> "First the defendant must show that counsel's performance was deficient. This requires showing

> that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel#s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

The Court, in Strickland, also stated that:

> "When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencers-including an appellate court, to the extent that it independently reweighs the evidence-would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

PROPOSITION V

THE STATE TRIAL COURT VIOLATED PETITIONER'S RIGHT TO DUE PROCESS BY SUMMARILY DENYING PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF.

In this proposition the petitioner

has failed to state facts which raise a federal constitutional question. The Oklahoma post-conviction procedure is a matter of state law and generally the interpretation of a state statute by the highest court of the state will be followed by the federal courts. Tyrrell v. Crouse, 422 F.2d 852 (10th Cir. 1970), Chavez v. Baker, 399 F.2d 943 (10th Cir. 1968). In this matter, the Court notes that the highest court of the state did, at Cartwright v. State of Oklahoma, 708 P.2d 592 (Okla. Cr. 1985), uphold the trial court's denial of postconviction relief. Further, even on matters dealing with direct appeal case law clearly indicates as stated in McInnes v. Anderson, 366 F.Supp. 983, 986 (E.D. Okla. 1973) that:

> "A state is not required by the Federal constitution to provide an

> appellate review of a criminal file. Griffin V. Illinois, supra. If it provides for an appeal it may do so in the manner and on the same terms which it deems proper."

In an analogous situation, the Tenth Circuit Court of Appeals in Snow v. Oklahoma, 489 F.2d 278 (10th Cir. 1973) held that there is no federal constitutional right to a preliminary hearing. See also Bond v. Oklahoma, 546 F.2d 1369 (10th Cir. 1976) and Brinlee v. Crisp, 608 F.2d 839 (10th Cir. 1979) cert. denied 444 U.S. 1047 (1980).

Accordingly, the petition for writ of habeas corpus and request for stay of execution is denied.

Dated this ___ day of February, 1986.

_____
United States District Judge

APPENDIX C

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

WILLIAM THOMAS CARTWRIGHT, Appellant, v. THE STATE OF OKLAHOMA, Appellee.	)	No. PC-85-594

ORDER DENYING APPLICATION FOR POST-CONVICTION RELIEF AND AFFIRMING DEATH SENTENCE

The petitioner, William Thomas Cartwright, has appealed from the denial on August 22, 1985, of post-conviction relief by the District Court of Muskogee County in Case No. CRF-82-192. We affirm the district court's denial of post-conviction relief, and affirm the sentence of death.

On October 25, 1982, the petitioner was sentenced to death by lethal drug

injection for the offense of Murder in the First Degree, and on November 12, 1982, he was sentenced to seventy-five years' imprisonment for the offense of Shooting With Intent to Kill. After an appeal to this Court, we affirmed the convictions and sentences, Cartwright v. State, 695 P.2d 548 (Okl.Cr. 1985), and the Supreme Court of the United States denied the petition for writ of certiorari, Cartwright v. Oklahoma, ____ U.S. ___, 105 S.Ct. 3538, 87 L.Ed.2d 661 (1985).

The petitioner raises thirteen assignments of error, ten of which the district court ruled were raised, or could have been raised on direct appeal. We have consistently held that 22 O.S. 1981, § 1086 bars the assertion of alleged errors which could have been

raised on direct appeal, but were not. Ellington v.Crisp, 547 P.2d 391 (Okl.Cr. 1976). Therefore, we will not address those assignments of error.

Two assignments of error were raised twice, using different methods to present them. Those assignments of error are (1) that trial counsel was ineffective, and (2) that the trial court erred in failing to appoint a psychiatrist or psychologist to examine the petitioner when defense counsel requested psychological evaluation. In his first method of raising these issues he asserts. that they should have ,been raised on direct appeal, and that failure to do so, resulted in ineffective assistance of appellate counsel.

The Supreme Court of the United States has held that, "A first appeal as of

right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. ___, ____, 105 S.Ct. 830, 836, 83 L.Ed.2d 821, 830 (1985). The Court stated that appellate counsel must be available to assist in preparing and submitting a brief to the appellate court, and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim. Counsel is not required to advance every argument, regardless of merit. See Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

The fact that petitioner's appellate counsel did not raise the two assignments of error which we noted, does not lead to

the conclusion that he was ineffective. The basic test for ineffectiveness of trial counsel is: "Whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. ____, _____, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692-693 (1984). The proper standard as set forth in that case is "reasonably effective assistance." It further speaks of the necessity of a reviewing court indulging "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and that a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." These same standards are applicable to appellate counsel.

The petitioner in his direct appeal was represented by the Appellate Public Defender, who submits nearly sixty percent of the cases reviewed by this Court. To hold that appellate counsel should brief every nonfrivolous issue raised in a case would obviously greatly increase the workload of both the Appellate Public Defender, the office of Attorney General, who must answer the issues raised, and this Court, which examines each issue. Furthermore, it would tend to lessen the effectiveness of the briefs. Chief Justice Burger, speaking for the majority in Jones quoted Justice Jackson, who after observing

appellate advocates for many years, stated:

> Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. . . . [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one. Jackson, Advocacy Before the Supreme Court, 25 Temple L.Q. 115, 119 (1951).

Jones, 463 U.S. at _____, 103 S.Ct. at 3313, 77 L.Ed.2d at 994.

The importance of carefully selecting legal issues is further emphasized in a recent Oklahoma Law Review article which specifically addresses the writing of effective briefs submitted to this Court:

> The appellate attorney must evaluate the possible legal issues in order to determine which issues are worth pursuing and which issues

> should be discarded. If he fails to winnow the strong issues from the weak, the attitude of the appellate court may well be anger because the attorney has failed to do his job and as a consequence is wasting the court's time with meaningless verbiage.

Kershen, The Written Brief For Criminal Cases in Oklahoma, 35 Okl. L. Rev. 499 (1982).

Having carefully reviewed the record, including the transcripts of the trial and the motions hearings, we find the allegation of ineffectiveness of appellate counsel to be without merit.

The two assignments of error mentioned previously are raised through a second method by asserting they are issues of constitutional dimension and thus are not subject to the waiver rule of 22 O.S. 1981, § 1086. Whether a petitioner may assert constitutional issues at any time was addressed in Jones v. State, 704 P.2d

1138 (Okl.Cr. 1985), where we held that we consider a constitutional argument, raised for the first time on application for post-conviction relief where the constitutional remedy was unavailable at trial or on direct appeal. In such a case a "sufficient reason" has been stated for the failure to present the issue on direct appeal. Stewart v. State, 495 P.2d 834 (Okl.Cr. 1972).

Concerning the ineffective assistance of trial counsel argument, the record reveals that the petitioner submitted his brief in 1983. On May 14, 1984, Strickland, supra; was handed down which set the constitutional standards for effective assistance of trial counsel. This Court held in Collis v. State, 685 P.2d 975 (Okl.Cr. 1984) that the standard laid down in Strickland was consistent

with the standard this Court has used when determining whether a defendant was provided effective assistance of counsel. See Johnson v. State, 620 P.2d 1311 (Okl.Cr. 1980). As this remedy was available at the time of direct appeal, petitioner has failed to state a sufficient reason for not raising the issue at that time. Therefore, we will not address it.

Concerning the trial court's refusal to appoint a psychiatrist or psychologist to aid the petitioner in developing the defense of insanity, we note that Ake v. Oklahoma, 470 U.S. __, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), which addresses the issue of court appointed psychological assistance to indigent defendants, was decided subsequent to the submission of the direct appeal for decision. As this

constitutional remedy was unavailable at trial, or during direct appeal, we shall address it. This remedy requires that:

> Under certain circumstances, the State may be obligated to provide an indigent defendant with access to competent psychiatric assistance in preparing his or her defense. [Citation omitted]. To trigger this process, the defendant must demonstrate 'to the trial judge that his sanity at the time of the offense is to be a significant factor at trial. . . .' [Ake] at ____, 105 S.Ct. at 1092, 84 L.Ed.2d at 60.

Liles v. State, 702 P.2d 1025, 1033 (Okl.Cr. 1985).

We find that the petitioner failed to make such a demonstration. In. Ake, the Supreme Court applied the standards discussed in its decision to the facts, and concluded that Ake's sanity was likely to be a significant factor in his defense:

> For one, Ake's sole defense was that of insanity. Second, Ake's

behavior at arraignment just four months after the offense, was so bizarre as to prompt the trial judge, sua sponte, to have him examined for competency. Third, a state psychiatrist shortly thereafter found Ake to be incompetent to stand trial, and suggested that he be committed. Fourth, when he was found to be competent six weeks later, it was only on the condition that he be sedated with large doses of Thorazine three times a day, during trial. Fifth, the psychiatrists who examined Ake for competency described to the trial court the severity of Ake's mental illness less than six months after the offense in question, and suggested that his mental illness might have begun many years earlier. Ap. 35. Finally, Oklahoma recognizes a defense of insanity, under which the initial burden of producing evidence falls on the defendant.

Ake, at ___, 105 S.Ct. at 1098, 84 L.E.2d at 68.

In contrast, the petitioner did not use the insanity defense, he did not display any bizarre behavior, an examination by the state psychiatrist showed that he was competent to stand

trial and was able to assist in his defense, and finally stated that further observation was unnecessary. Although the petitioner complained of recurring blackouts, a physician who examined him three days after the crimes could not find anything abnormal even though his attention was specifically called to the "soft spot" on the petitioner's head alleged to be the reason the blackouts occurred. In his statement to the police, the petitioner first claimed to have experienced a blackout and was therefore unable to recall his last two days, but after further questioning he gave in detail the events during the crimes. These events were corroborated by the witness, Mrs. Riddle. In his testimony during the trial he first claimed that he had been hit on the head,

and that he had no recollection of what happened for the next two days. On cross-examination he claimed he could not remember the statement which he made to the police which contradicted his testimony. On surrebuttal he changed his story, claimed that he gave the police a statement which he was instructed to give by his unknown assailant about whom he had earlier testified. We find no merit to the petitioner's claims, and no merit to this assignment of error.

Finally, the petitioner alleges that error was committed when the district judge who heard his petition, refused to continue the hearing and refused to disqualify himself from hearing the petition. An examination of the original petition and the hearing transcript reveals that no valid purpose could have

been served by granting a continuance. The only proposition creating an issue of fact was whether Charma Riddle recanted her testimony that the petitioner was the person who had committed the crimes alleged. She was available and testified at the hearing, denying she ever recanted. Summary disposition of all the other issues was appropriate for the reasons we have stated. Furthermore, as the alleged prejudice resulting from the failure to disqualify is that petitioner's counsel was given insufficient time to prepare and present evidence, our finding that refusal to grant a continuance was proper, disposes of this matter as well.

IT IS THEREFORE THE ORDER OF THIS COURT that the district court's denial of post-conviction relief in the District

Court of Muskogee County, Case No. CRF-82-192, should be, and the same is, AFFIRMED.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this _____ day of _____, 1985.

_____
ED PARKS, PRESIDING JUDGE

_____
TOM BRETT, JUDGE

_____
HEZ J. BUSSEY, JUDGE

ATTEST:

_____
(Clerk)

APPENDIX D

APPENDIX D

IN THE DISTRICT COURT OF MUSKOGEE COUNTY
STATE OF OKLAHOMA

WILLIAM THOMAS CARTWRIGHT,	)	
Petitioner,	)	
v.	)	No. CRF-82-192
THE STATE OF OKLAHOMA,	)	
Defendant.	)	

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

On the 22nd day of August, 1985, there comes on for hearing the Defendant's Application for Post-Conviction Relief, the Defendant appearing by his attorney of record, Mandy Welch, and the State appearing by W.A. Edmondson, District Attorney for Muskogee County, and having reviewed the Record in the above styled cause, including all pleadings and affidavits attached thereto, both written and oral,

attached thereto, both written and oral, and the Opinion of the Court of Criminal Appeals in case number F-82-758 (William Thomas Cartwright vs. The State of Oklahoma), having received offers of proof on behalf of the Defendant, and. having heard argument of counsel and citations of law from both the State and the Defendant, this Court makes the following Findings of Fact and Conclusions of Law as to the issues raised in the Application:

Issue 1. That the Defendant was denied effective assistance of counsel due to eight alleged errors or omissions on the part of defense trial counsel. The Court makes the following Findings of Fact:

a. That Defendant's trial counsel has been engaged in the practice of law

for nine years prior to his representation of this Defendant and has appeared before this Court on numerous cases and I have found him to be a conscientious and diligent attorney.

b. That the practice of Defendant's trial counsel was predominately a trial practice, with emphasis on criminal cases.

c. That the Defendant's trial counsel had served with distinction as Muskogee Municipal Court Judge, in addition to his private practice, prior to his representation of Defendant.

d. That the Defendant's trial counsel now serves as an Associate District Judge in another county.

e. That a review of the entirety of the record reveals that trial counsel made extensive use of pre-trial motions,

obtained complete discovery of the State's files in the case, and pursued a vigorous defense at trial in both stages despite the existence of an eye witness to the murder and a taped confession by the Defendant.

The Court therefore makes the following Conclusions of Law:

a. That the Defendant has failed to establish in light of the record that any alleged errors or omissions by trial counsel, viewed in retrospect, constituted ineffective assistance of counsel; and, further,

b. That this issue was, in some respect, and could have been, in all respects, raised on direct appeal and thus is not properly presented in an Application for Post Conviction Relief.

On these Findings and Conclusions, Post-Conviction Relief shall be denied.

Issue 2. That the Defendant was deprived of his rights by the improper excusal of Juror Applegate for cause. the Court makes the following Conclusions of Law:

a. Based upon the statements of the juror, as cited in Defendant's Application, the juror was properly excused.

b. That this issue could have been raised on direct appeal and thus is not properly presented in an Application for Post-Conviction Relief.

On these Findings and Conclusions, Post-Conviction Relief shall be denied.

Issue 3. That the Defendant was denied effective assistance of counsel because of the trial court's prohibition

of both State and defense questioning of prospective jurors on their views relating to the death penalty. The Court makes the following Findings of Fact:

a. That the trial court asked each prospective juror "Witherspoon" questions regarding their attitudes toward infliction of the death penalty.

b. That neither the State nor the defense objected to this procedure.

c. That, other than the "Witherspoon" type questions, counsel for each side was given great latitude in voir dire examination.

The Court therefore makes the following Conclusions of Law:

a. That the manner in which voir dire examination is conducted is within the sound discretion of the trial court.

b. That the manner in which voir dire was conducted in the instant case did not deprive petitioner of effective assistance of counsel.

c. That the issue raised herein could have been raised on appeal and thus is not properly presented in an Application for Post-Conviction Relief.

On these Findings of Fact and Conclusions of Law, Post-Conviction Relief shall be denied.

Issue 4. That the Defendant is entitled to post-conviction relief because of newly discovered evidence of a recantation of testimony by the eyewitness of the murder, Mrs. Charma Riddle. The Court makes the following Findings of Fact:

a. That the person to whom Mrs. Riddle allegedly made her recantation was

not named in Defendant's Application, and, although such person was supposedly a relative of the Defendant's his name was presented as a blank space in the Application.

b. No affidavit from any person was attached to the Application alleging to have heard any contradictory statement from, Mrs. Riddle.

c. Mrs. Riddle testified before this Court in the form of an oral affidavit to be considered with the State's Motion for Summary Judgment on the Application and denied any recantation of her sworn testimony at Preliminary Hearing and Trial of the above cause and reaffirmed in open court her identification of the Defendant, a person known to her before the crime, as

the person who murdered her husband and attempted to murder her.

d. The Court found Mrs. Riddle to be a totally competent and credible witness, with vivid and accurate recall of the events which transpired in May of 1982, and further found her testimony before this Court to be believable.

e. That Mrs. Riddle was subjected to cross examination by defense counsel at preliminary hearing, at trial, and again during the Court's consideration of Defendant's Application for Post-Conviction Relief.

f. That the transcripts reveal that the issue of Eulan Pack, Jr.'s involvement in the crime was explored during the trial of the cause with a denial by Mr. Pack of any involvement and a categorical statement by the eyewitness

that the killer was William Thomas Cartwright and not Eulan Pack, Jr., which testimony was reaffirmed by Mrs. Riddle's oral affidavit herein.

The Court therefore makes the following Conclusions of Law:

a. There has been no recantation of testimony by the eyewitness to the crime.

b. That assuming, arguendo, the Defendant could produce a relative or other person to testify that Mrs. Riddle had made contradictory statements post-trial, said testimony would not constitute newly discovered evidence and would not be deemed credible in light of the strong reaffirmation of prior testimony by Mrs. Riddle.

On these Findings of Fact and

Conclusions of Law, Post-Conviction Relief shall be denied.

Issue 5. That the Defendant was denied due process by the denial of a court appointed psychiatrist or psychologist. The Court makes the following findings of fact:

a. While defense counsel did, in fact, request examination "either by a psychoanalyst employed by the State of Oklahoma or in private practice and retained by the State of Oklahoma for this purpose" (defense motion filed July 29, 1982), the file reflects no instance where the sanity of the Defendant was brought in question by any witness or affidavit or plea.

b. That the Defendant was examined at Eastern State Hospital and the Court file reflects its report to the

Court dated May 25, 1982, wherein Dr. Leoncio G. Curva advised the Court that the Defendant was able to advise and assist counsel, was able to fully apprehend the nature of the charges against him, was not in need of psychiatric care or treatment and was not a mentally ill person as defined in Section 3, Title 43A of the Oklahoma Statutes.

c. That the Defendant was further examined by a medical doctor, Richard L. Pentecost, on September 8, 1982, and Dr. Pentecost's letter to the court, filed September 28, 1982, reflects no complaint by Defendant as to blackouts, psychological impairment or mental imbalance and no spontaneous comments by the doctor in those regards.

d. That Dr. Tom Morgan testified at trial that he examined Defendant at Muskogee General Hospital two days following the murder and that Defendant was oriented as to time and place, was able to appropriately answer questions and that an examination of Defendant's head revealed no abnormalities; an emergency room nurse also testified that Defendant was coherent, answered appropriately and was well oriented in May of 1982.

e. That the trial transcript reveals Defendant's claim of blackout was contradicted by Mrs. Riddle's testimony that he engaged in conversation with her during the crime (when asked why he was doing what he did, Defendant's response was "you shouldn't have fired me"), and was further contradicted by Investigator

Gary Sturm's testimony that the Defendant gave a full and complete confession to the crime, relating details of events which transpired during the murder.

f. That there was no credible testimony in the record that the Defendant ever suffered from blackouts, much less was in a state of blackout during the murder.

g. That the Defendant, himself, recanted his testimony of blackout in a handwritten statement dated October 25, 1982, and made a part of the record in the Pre-Sentence Investigation. That statement, written by the Defendant, contained the following pertinent parts:

> I told him (Hugh Riddle) I reseaved (sic) a phon (sic) call saying that you wanted to sedle (sic) out of court, he then told me I'd best leave now, or something mite (sic) happon (sic), I said ok, I turned to walk away some one hite (sic) me in the head, as I whent (sic) to

the ground I saw a pare (sic) of work boots & blue jeans, then someone stuck something in my arme (sic), I heard Hugh say no - then I heard a screm (sic) a gun shots (sic) I tryed (sic) to move to run I couldn't move I was nume (sic) all over, they blindfolded me and tied my hands and feet.& put me in a van, I heard one of them talking he said we'll go out thc back way, no one can see use (sic) go out that way, the people on the corner are not at home, they kept going I heard other cars & we kept stoping & starting we were in town I could tell from the other trafic (sic) I heard sireens (sic) police car or something they said we got out of there just in time, one said that she'll say it was him because of what I said to her there's no way she could say it was anyone else, they stoped, opened the doors and took me out of the van, & put me on a plower (sic) and one said go get the paper, he then told me that I'd better leason (sic) to every thing he told me & remember it if I didn't he'd kill my mom & dad & girl friend and if I did beleave (sic) him that for me to look how easy it was for them to get me; then one of them said take his shirt off him and put mine on him that way if they pick him up he'll look like the discription (sic) she gives to the police,

In the aforementioned statement, Defendant states that he did not, in fact, blackout, but was taken captive by the "real killers" and was given instructions of what to confess to in the event he was caught.

h. That, in the first stage of the trial of the above styled cause, Defendant claimed a blackout and denied having given any confession to Investigator Gary Sturm, but that in the second stage, Defendant admitted giving the statement to Sturm but alleged that he had been instructed by an unknown person what to say.

i. Defendant admitted in the trial of the cause that he had never requested or received any medical attention from, doctor or hospital for

what he claimed to have been frequent blackouts.

j. At the trial of the cause the Defendant called no less than seven former co-workers or employers who testified that the Defendant had been a good worker and had never been violent. None testified as to any knowledge of blackouts or loss of memory by the Defendant. The Defendant's mother testified that the Defendant had a severe head injury which caused headaches, but offered no knowledge of blackouts or loss of memory. Only the Defendant's sister, Dovie Fields, testified that the Defendant, as a result of his head injury, would, on occasion "pass out". And only the Defendant testified that the Defendant was capable of blacking out mentally while remaining physically

awake. The Defendant contradicts this allegation by his written statement of October 26, 1982.

The Court therefore makes the following Conclusions of Law:

a. That the Defendant was competent to stand trial, to understand the proceedings against him, and to advise and assist counsel.

b. That the issue of sanity was not raised during the trial of the above styled cause.

c. That the question of a physically induced blackout was fully explored at triál.

d. That the Defendant, while claiming blackout during the trial of the first stage, recanted that claim in the second stage and again prior to sentencing and his resurrection of that

claim in the light of Ake v. Oklahoma, 105 S. Ct. 1087 (1985), is not credible.

e. That the issue raised herein could have been raised on direct appeal and thus is not properly presented in an Application for Post-Conviction Relief.

On these Findings of Fact and Conclusions of Law, Post-Conviction Relief shall be denied.

Issue 6. That the Defendant was deprived of a fair trial due to remarks of the prosecutor.

The Court finds that the Court of Criminal Appeals reviewed the record for fundamental error and, having done so, its findings are res judicata here, and, further, that any such errors could have been raised on direct appeal and are not property presented in an Application for Post-Conviction Relief.

On these Findings, Post-Conviction Relief shall be denied.

Issue 7. Grounds Seven, Eight, Nine and Ten deal with the jury and trial court's findings that the murder was "heinous, atrocious, or cruel." The Court finds that the issues raised herein were dealt with in part by the Court of Criminal Appeals and the findings of that Court are res judicata here. The Court further finds that any such issues which were not raised on direct appeal could have been so raised and thus are not properly presented in an Application for Post-Conviction Relief.

On these Findings of Fact and Conclusions of Law, Post-Conviction Relief shall be denied.

Issue 8. Grounds Eleven and Twelve deal with the jury and trial court's

findings that the murder created a great risk of death to more than one person. The Court finds that the issues raised herein were dealt with in part by the Court of Criminal Appeals and the findings of that Court are res judicata here. The Court further finds that any such issues which were not raised on direct appeal could have been so raised and thus are not properly presented in an Application for Post-Conviction Relief.

On these Findings, Post-Conviction Relief shall be denied.

Issue 9. That the Defendant was deprived of his rights by the improper excusal of Jurors Applegate and Sweet. The Court makes the following Conclusions of Law:

a. Based upon the statements of the jurors, as cited in Defendant's

Application, each juror was properly excused for cause.

b. That this issue could have been raised on direct appeal and thus is not properly presented in an Application for Post-Conviction Relief.

On these findings and conclusions, Post-Conviction Relief shall be denied. Issue 10. That the Defendant was denied a fair trial by the limitation of mitigating testimony in the first stage, later admitted in the second stage. The Court makes the following Findings of Fact:

a. That the trial court in no manner limited the number of witnesses who could be called or testimony which could be presented in the mitigation stage of the proceedings.

b. That this issue was considered on appeal.

The Court therefore makes the following Conclusions of Law:

a. That the issue is without merit.

b. That the findings of the Court of Criminal Appeals in that regard are res judicata here.

On those findings of Fact and Conclusions of Law, Post-Conviction Relief shall be denied.

Issue 11. Ground Fifteen in Defendant's Amended Application for Post-Conviction Relief alleges that Defendant was denied effective assistance of appellate counsel for failure to raise issues which could have been raised on direct appeal. The Court makes the following Findings of Fact:

a. Appellate counsel is not obligated to raise issues on appeal which lack merit or foundation in the record.

b. Defendant was represented on appeal by E. Alvin Schay, Appellate Public Defender for the State of Oklahoma, who possesses an extensive background in criminal appeals including death penalty cases.

c. It is the practice of the Oklahoma Court of Criminal Appeals to review every case, and particularly death penalty cases, for fundamental error and none were cited in the Opinion of that Court in this Case.

The Court therefore makes the following Conclusions of Law:

a. That Defendant has failed to establish a denial of effective assistance of appellate counsel.

b. That no fundamental error appears in the transcript of the trial of this cause, that no fundamental errors were found in the Court of Criminal Appeals review of this cause, and that no fundamental error was created in the alleged omissions of counsel in the appeal of this cause.

On these Findings of Fact and Conclusions of Law, Post-Conviction Relief shall be denied.

THE COURT MAKES THE FOLLOWING ADDITIONAL FINDINGS:

1. While the Defendant made no application for writ of habeas corpus ad testificandum, this Court made inquiry as to whether there was any issue which required his presence in Court or upon which, his testimony would give guidance to the Court in reaching its

determinations. Further, the Court interrupted its proceedings to provide Defendant's counsel an opportunity to consult with her client by phone and accepted a collect call from the Defendant for that purpose. No issue, on its face, required the presence of the Defendant. Further, at no point in the proceedings did the argument of counsel, offers of proof or recitations of fact in the case, give rise to a necessity to suspend the proceedings to obtain the presence of the Defendant. This Court now specifically finds that the Defendant's presence was not necessary nor would it have been of assistance in obtaining a full and complete resolution of the issues raised herein.

2. This Court has further reviewed the entirety of the record for

fundamental error. This review has included the initial determination of the competency of the Defendant, all pre-trial and trial motions and the hearings held thereon, the extent of discovery afforded the Defendant, jury selection and examinations of jurors during that process, argument of counsel, the "blackout" issue and the presentation of both aggravating and mitigating factors in the second stage of the proceedings. While this Court cited a number of issues which were not properly raised in an Application for Post-Conviction Relief, all such issues were reviewed for fundamental error and no such error was found.

BASED UPON THE FINDINGS of the Court relative to each of the issues presented, it is the Order of this Court that the

Application for Post Conviction Relief, and the Amended Application for Post Conviction Relief, and each ground contained therein, be, and are hereby, DENIED.

_____

JUDGE OF THE DISTRICT COURT

APPENDIX E

APPENDIX E

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

WILLIAM THOMAS CARTWRIGHT, Appellant,	)	
v.	)	No. F-82-758
THE STATE OF OKLAHOMA, Appellee.	)	

William Thomas Cartwright was charged in the District Court of Muskogee County, Oklahoma, for the crimes of Murder in the First Degree, and Shooting with Intent to Kill, Case No. CRF-82-192. He was granted a change of venue to Cherokee County, Oklahoma. The jury before which he was tried returned verdicts of guilt on both counts, sentenced him to death for the murder, and to a term of seventy-five years' imprisonment for the shooting. He was sentenced accordingly.

The appellant began working for the victims in this case, Hugh and Charma Riddle, in their Muskogee remodeling business in July of 1981. His employment was terminated in December of that year. According to the appellant, he was fired because he demanded the Riddles pay for an injury he allegedly received on the job. According to Charma Riddle, he was laid off because of lack of business.

The appellant moved to Las Vegas, Nevada in January of 1982. He returned to Muskogee in late April, supposedly believing his claim against the Riddles for injury would be settled. He told a Muskogee acquaintance that he intended to "get even" with the Riddles.

On May 3, 1982, Hugh and Charma Riddle spent the night with Charma's father in Muskogee. They did not return

to their rural Muskogee home until the early evening hours of May 4. They ate their evening meal and retired to watch television. As Charma made her way to the bathroom from the living room, she was confronted by a man in her hallway with a shotgun. She grabbed the gun, and the man fired it into her leg. After she fell, she saw her assailant and recognized him as the appellant. He shot her again.

Charma then saw the appellant walk into the living room where Hugh was. She saw the appellant fire two blasts from the shotgun, and heard her husband scream.

The appellant disappeared into the living room, and Charma dragged herself down the hall into a bedroom. She tried to use the telephone, but it was dead.

She then began to write her assailant's name on the bedsheet in her blood. She managed to spell the letters TOM CAR.

The appellant entered the bedroom. Charma asked him why he had shot them, and he replied that they should not have fired him. Charma then asked the appellant to help her. The appellant slit her throat and stabbed her with the hunting knife the Riddles had given him for Christmas.

Miraculously still alive, Charma heard the telephone ring in another room. She deduced that the telephone she had tried to use earlier was only unplugged. She plugged it in and called an operator, who contacted the Muskogee police department. She told the police dispatcher that Tom Cartwright had shot her, and that he was still in the house.

Pursuant to the directions Charma gave, Muskogee County Sheriff's officers and Muskogee police officers arrived at the house. The first officer who arrived observed a man standing outside the Riddle home. The man dodged between trees before disappearing into the darkness. A subsequent search for him was fruitless.

Clothing, weapons and other possessions belonging to the Riddles were found inside their vehicle. Found along with those articles was a silver jacket which was identified as being similar or identical to one the appellant owned.

The officers found the body of Hugh Riddle lying face down in the living room inside the Riddle home. Charma was still in the bedroom. She was taken by ambulance to the Muskogee Hospital. She

lived to testify against the appellant at trial.

Two days after the murder/shooting (May 6, 1982), the appellant called his sister from a pay telephone in Muskogee. The sister picked him up, fed him, gave him a change of clothes and called the Muskogee County District Attorney. The District Attorney came to the sister's house, and got the appellant. The appellant was taken to jail, but then was taken to the hospital, because he complained of a headache and a leg injury. After a doctor had seen him and prescribed aspirin, the appellant was taken to the courthouse for interrogation. He confessed to the crimes during the interrogation.

The Riddles' telephone bill for the month of May, 1982 was introduced into

evidence to demonstrate that at 11:13 a.m. on May 4, a telephone call was placed to a Las Vegas, Nevada telephone number. It was established that the number belonged to the appellant's fiancee.

A note which was found tacked to the door of the Riddle residence by Charma's father on May 6 was introduced into evidence. The note contained several misspellings, and stated that the Riddles had made an emergency trip to Tennessee. Charma testified that although she and Hugh had planned a trip to Tennessee at some point in the coming year, they were not about to make such a trip, and neither of them had written the note. The appellant was requested to write the same words that the note contained at trial. He misspelled several words,

including the identical misspelling of the word "such," which was spelled "sutch" in both notes.

The appellant testified that he spoke with Hugh Riddle in the late afternoon of May 4, concerning his alleged injury. Hugh ordered him off his property, and as he turned to leave, he was struck on the head. He stated that he remembered nothing until May 6, when he called his sister.

Upon cross examination, the prosecutor read several excerpts of the appellant's confession for the purpose of impeaching his testimony concerning the two day "blackout." The appellant stated he did not remember making any of the statements.

The appellant presented lay testimony that, due to a childhood injury, he had a

"soft spot" on his head, which, when touched, caused him to "black out." Also, several relatives, employees, supervisors and co-workers testified that he was a good worker, and that he was not a violent person.

The appellant first complains that the confession he made on May 7 was involuntary, and therefore inadmissible for any purpose, because he was not aware he was talking to law enforcement authorities. He contends that he consented to interrogation by the District Attorney because he was convinced by his sister that the District Attorney was an attorney who wanted to help him.[1]

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[1] The appellant's contact with the Muskogee County District Attorney (hereinafter called the D.A.) was engineered by his sister, Dovie Field. Shortly after the murder/shootings, a

From a review of the testimony had at trial and on the motion to suppress the confession, we are convinced that the circumstances surrounding the appellant's interrogation indicate that he was coherent, and doubtless knew that he was dealing with law enforcement officials.[2]

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close friend of the Riddles contacted Dovie and threatened to kill her and her brother. She contacted the police who, after some investigation, told her to file a complaint at the courthouse. At the courthouse, the D.A.'s secretary learned who Dovie was, and directed her to the D.A.'s office. Dovie and the D.A. discussed the appellant, and she agreed to contact the D.A. when she saw him. According to Dovie, at that time she knew the D.A. was a District Attorney, but thought that meant he was a "higher up

The portions of the confession were therefore properly utilized for purposes of impeachment. No objection was made to the trial court's instructions concerning the substantive use of the confession, or to the prosecutor's remarks concerning such use. Thus, any error was waived. Jetton v. State, 632 P.2d 432 (Okl.Cr. 1981). Moreover, in view of both the direct and circumstantial evidence of the appellant's guilt independent of the portions of the confession used at trial, we are convinced that any possible error which may have occurred was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17

See footnote 1, infra.

It is also interesting to note that the appellant testified that he was abused as he climbed the stairs to the courthouse, that he was shouted at prior to the tape recorded interrogation and that he was told the uniformed police officer saw only what he was told to see. Without deciding whether the allegations are true, we would only comment that these circumstances support the conclusion that the appellant knew he was not in the hands of a defense attorney.

[3] Title 21 O.S. 1981, § 701.10 states, in pertinent part that, "Only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible."

L.Ed.2d 705 (1967); Coleman v. State, 668 P.2d 1126 (Okl.Cr. 1983).

The appellant's third assignment of error is that the failure to file a bill of particulars by the time of the preliminary hearing, or to present evidence in support thereof at the preliminary hearing, deprived the trial court of jurisdiction to sentence him to death. We have previously held that defendants in capital cases are not entitled to preliminary hearings on bills of particular. Stafford v. State, 669 P.2d 285 (Okl.Cr. 1983), vacated and remanded on other grounds, _____ U.S. _____, _____ S.Ct. _____ (1984); Coleman, supra; Johnson v. State, 665 P.2d 815 (Okl.Cr. 1983); Brewer v. State, 650 P.d 54 (Okl.Cr. 1982). The bill of particulars, filed on October 4,

1982, complied with the requirements of 21 O.S. 1981, § 701.10.[3] The allegations contained therein consisted of the facts of the case, and inferences permissibly drawn therefrom. Further, we do not believe there was any surprise or prejudice to the appellant, since trial counsel neither raised an objection concerning the matter prior to trial or in the motion for new trial. The allegation is without merit.

The appellant's second assignment of error is that the trial court erroneously failed to instruct the jury that the trial court would impose a life sentence

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[3] Title 21 O.S. 1981, § 701.10 states, in pertinent part that, "Only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible."

if a unanimous verdict were not reached on the issue of punishment.

The instructions given by the trial court accurately and adequately addressed the matter. The instructions stated, in pertinent part:

> Should you unanimously find that one or more aggravating circumstances existed beyond a reasonable doubt, you would be authorized to consider imposing a sentence of death.
>
> If you do not unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances existed, you are prohibited from considering the penalty of death. In that event, the sentence must be imprisonment for life. (Instr. No. 15, Tr. 620).
>
> * * *
>
> If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances, the d e a t h

penalty shall not be imposed. (Instr. No. 17(a), Tr. 621).

This assignment of error has no merit.

The appellant's ninth allegation of error proceeds upon the following two premises: first, in the guilt stage, the trial court ruled certain testimony by the appellant's mother and sister inadmissible;[4] and second, all the testimony presented by the appellant in the guilt stage was incorporated by stipulation as mitigating evidence in the

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[4] The trial court refused to allow the appellant's mother to testify to the appellant's character and disposition as compared to his siblings'. The mother was allowed to testify, as were several other witnesses, that the appellant had a nonviolent disposition.

The trial court also refused to allow the appellant's sister to give testimony in rebuttal, which defense counsel admitted would be nothing different or new from her testimony given during the case in chief.

punishment stage. Citing Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), appellate counsel therefore concludes that, by virtue of the trial court's rulings in the guilt stage, the appellant's right to present evidence in mitigation of the death penalty was unconstitutionally curtailed.

The trial court's rulings in the guilt stage were correct. See, 12 O.S. 1981, 2403, footnote 4 supra. Additionally, there is no argument in either the record or upon this appeal to indicate that counsel was, or even considered himself to be, prohibited from presenting that evidence in the second stage, had he thought it necessary or useful. The argument that alleged error was "bootstrapped" into the punishment

stage by a voluntary stipulation is utterly devoid of merit.

We now turn to our statutorily mandated review of whether the sentence of death was appropriate in this case. See, 21 O.S. 1981, § 701.13(C)(1-3).

We first find from a review of the transcript that the sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor. The appellant was granted a change of venue to ensure his trial was removed from the arena of public prejudice in Muskogee County. The trial court, prosecutor and defense counsel all performed their duties admirably, and the appellant received a fair trial.

Secondly, we must determine whether the evidence supported the jury's determination that the murder of Hugh

Riddle was especially heinous, atrocious or cruel, and that the appellant knowingly created a risk of death to more than one person. The appellant has also raised these considerations in his fourth and sixth allegations of error, respectively.

In assessing whether the murder was especially heinous, atrocious or cruel, the appellant would have us consider the shooting as an isolated event, to-wit: that the appellant walked into a room and shot Hugh Riddle at close range with a shotgun, killing him almost immediately. He would therefore have us conclude under Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 17599, 64 L.Ed.2d 398 (1980) and Odum v. State, 651 P.2d 703 (Okl.Cr. 1982) that the murder was not torturous,

and therefore was not especially heinous, atrocious or cruel.

According to the plurality in Godfrey v. Georgia, the Georgia Supreme Court had defined the aggravating circumstance that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" essentially to mean that torture must have been involved in the murder. Godfrey, 446 U.S. at 431. This Court has not defined the "especially heinous atrocious or cruel" aggravating circumstance in such a manner. The statute is written in disjunctive language, and we have defined "heinous" as "extremely wicked or shockingly evil"; "pitiless or designed to inflict a high degree of pain, utter indifference to, or

enjoyment of the sufferings of others." Eddings v. State, 616 P.2d 1159 (Okl.Cr. 1980), remanded for resentencing 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

While it is true that torture may be a sufficient factor to justify a finding that the murder was especially heinous, atrocious or cruel, (see, Stafford v. State, 665 P.d 1205 (Okl.Cr. 1983), wherein the defendant marched six persons into a meat locker and opened fire, amidst the screams for help; and Jones v. State, 648 P.d 1251 (Okl.Cr. 1982), wherein the defendant shot his victim at point blank range, and mocked him as he bled to death), it is not a necessary one. In Eddings v. State, 616 P.d 1159 (Okl.Cr. 1980), this Court held that the fact that the victim was a police officer rendered the crime especially heinous,

atrocious or cruel under the above definitions.

This Court held in Boutwell v. State, 659 P.2d 322 (Okl.Cr. 1983), that the murder of a convenience store clerk was "especially heinous, atrocious or cruel," because the defendant, who knew the victim, planned the murder well in advance. In Davis v. State, 665 P.2d 1186 (Okl.Cr. 1983), this Court held that the defendant's act of shooting his victims several times was "atrocious." In Jones, supra, we held that the defendant's acts of shooting three persons in a barroom for no apparent reason was "extremely wicked" and "shockingly evil." In Chaney v. State, 612 P.2d 269 (Okl.Cr. 1980), we held that the manner in which the victims were killed, coupled with the demands for

ransom and the manner in which the bodies were disposed of justified the imposition of the death sentence, when one of the aggravating circumstances found was that the murder was especially heinous, atrocious or cruel.

Therefore, we decline to consider this murder as though it occurred in a vacuum. We deem it proper to gauge whether the murder was heinous, atrocious or cruel in light of the circumstances attendant to the murder, including the evidence that the appellant had previously expressed his intentions to "get even" with the Riddles; that he probably had been inside the Riddles' home as early as 11:13 a.m. on the day of the murder; that he either lay in wait for them, or returned under the cover of darkness, and broke into their home to

stalk them; that he attacked Charma immediately upon being discovered; that having gunned her down, he went into the living room and slayed Hugh; that Hugh doubtless heard the shotgun blasts which tore through Charma's body; that he quite possibly experienced a moment of terror as he was confronted by the appellant and realized his impending doom; that the appellant again attempted to kill Charma in a brutal fashion upon discovery that his first attempt was unsuccessful; that he attempted to conceal his deeds by disconnecting the telephone and posting a note on the door; and that his apparent attempt to steal goods belonging to the Riddles by loading them in their vehicle was prevented only by the arrival of the police officers, adequately supported the jury's finding. See as well our

discussion in Nuckols v. State, _____ P.2d _____, 55 O.B.A.J. 2259 (Okl.Cr. Oct. 19, 1984), of the consideration to be given to the manner of a killing in determining whether a murder is heinous, atrocious or cruel.

Likewise, it is apparent from these facts that the appellant's murderous escapade created a great risk of death to more than one person. Evidence at trial, which was subsequently incorporated by reference into the punishment stage, established that when Charma arrived at the hospital, her blood pressure was almost nonexistent, and that she would have died had she arrived any later. The fact that the two victims were not together in the same room when the appellant shot them is immaterial, in light of the close proximity of the

victims, and rapid and fluid nature of the appellant's attack.[5]

Thirdly, we hold the sentence of death in this case not to be excessive or disproportionate to the penalty imposed in similar cases, considering both the

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[5] The appellant argues in his seventh assignment of error that the trial court's failure to provide any definition for the "knowingly created a great risk of death to more than one person" aggravating circumstance unconstitutionally afforded the jury uncontrolled discretion, within the meaning of Godfrey v. Georgia, 446 U.S.420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

This argument has been raised for the first time on appeal. It is therefore not properly before us. McDuffie v. State, 651 P.2d 1055 (Okl.Cr. 1982). Moreover, as the State asserts, there was no reason to request such an instruction. The constitutionality of the statute has been upheld against arguments that it is overly broad. See, Burrows v. State, 640 P.2d 533 (Okl.Cr. 1982); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

crime and the defendant.[6] See Stout v. State, _____ P.2d _____, 55 O.B.A.J. 2269 (Okl.Cr. Oct. 24, 1984), wherein defendant broke into his sister's and brother-in-law's home and beat their brains out; Nuckols v. State, supra, wherein defendant stopped to help a motorist, drank a beer with him, visited with him, and then with codefendant attacked victim with a ball peen hammer, hitting and kicking victim to death;

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6 The appellant's fifth assignment of error is that this Court has been evaluating the heinous, atrocious or cruel aggravating circumstances (21 O.S. 1981, § 701.12(4) in an arbitrary manner. We have considered the argument to the extent that it applies to our consideration of whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. 21 O.S. 1981, § 701.10(c)(3). Beyond this, the appellant has no standing to complain of decisions reached in other cases.

Stafford v. State, 669 P.2d 285 (Okl.Cr. 1983) vacated and remanded on other grounds, _____ U.S. _____, _____ S.Ct. _____, (1984), wherein the defendant emerged from hiding and shot a family when they stopped along the roadside to help a person they believed to be in distress; Coleman v. State, supra, wherein the defendant murdered a man and woman who walked in on him as he was burglarizing their residence; Davis v. State, 665 P.2d 1126 (Okl.Cr. 1983), cert. denied, _____ U.S. _____ , 104 S.Ct. 203, wherein, after a prior altercation, the defendant shot and killed two persons as they were moving his estranged wife's property from his apartment; Ake v. State, 663 P.2d 1 (Okl.Cr. 1983), wherein the defendant and his accomplice gained entry into their

victims' home, tied them up, and shot the four of them, killing two; and Hays v. State, 648 P.2d 1251 (Okl.Cr. 1982), wherein the defendant assaulted some motorists with a pistol after having robbed and killed a store owner. We also find that the appellant's conduct was much more egregious than that of the defendant in Odum v. State, 651 P.2d 703 (Okl.Cr. 1982), wherein the defendant approached the pickup in which the victim was riding and, from the outside, fired one shot through his neck, and left the scene.[7]

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[7] We have also compared this case with the following cases and found the sentence of death herein is not excessive or disproportionate: Robison v. State, 674 P.2d 1134 (Okl.Cr. 1984), cert. denied, _____ U.S. _____, 104 S.Ct. 3548; Stafford v. State, 665 P.2d 1205 (Okl.Cr. 1983), vacated and remanded on other grounds, _____ U.S. _____, 104 S.Ct. 2652 (1984); Parks v. State, 651 P.2d 686 (Okl.Cr. 1982), cert. denied, _____ U.S.

In view of the above, we hold that the appellant's eighth assignment of error, that modification is mandated if one of the two aggravating circumstances falls, must be dismissed.

The judgments and sentences are AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT OF
CHEROKEE COUNTY, OKLAHOMA
THE HONORABLE HARDY SUMMERS, JUDGE

WILLIAM THOMAS CARTWRIGHT, appellant, was charged, tried and convicted in the District Court of Cherokee County, Oklahoma, Case No. CRF-82-192, for the crimes of Murder in the First Degree and Shooting with Intent to Kill. He was sentenced to death for the murder, and seventy-five years' imprisonment for the shooting. **AFFIRMED.**

E. ALVIN SCHAY
APPELLATE PUBLIC DEFENDER

_____, 103 S.Ct. 800 (1983); Jones v. State, 648 P.2d 1251 (Okl.Cr. 1983) cert. denied, _____ U.S. _____, 103 S.Ct. 799; and, Chaney v. State, 612 P.2d 269 (Okl.Cr. 1980), cert. denied, 450 U.S. 1025, 101 S.Ct. 1731 (1981).

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OPINION BY BUSSEY, P.J.
PARKS, J., CONCURS IN RESULTS
BRETT, J., CONCURS